Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT H. WYSHAK, PETITIONER

v.

STATE BAR OF CALIFORNIA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

A PETITION FOR A
WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CALIFORNIA,

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Pro se

170 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of Constitutional due process and equal protection for the California Supreme Court to summarily discriminate against attorneys in ordering disbarment without a judicial hearing and without a written opinion.

In this matter, Petitioner filed a Petition for Writ of Review of the Decision of the State Bar Court, etc. with the Cal. Supreme Court on February 3, 2000. Thereafter, on March 6, 2000, said Court filed its opinion in In re Rose, 22 Cal.4th 430, 93 Cal.Rptr.2d 298, an unrelated case, which held that said Court need not hear argument or issue a written opinion when it suspends or revokes a license to practice law. On March 22, 2000, the Court filed its Order denying the Petitioner's Petition for Writ of Review and disbarring petitioner without any hearing or reasons stated in writing.

The ultimate effect of this opinion in Rose is that attorneys are the only persons whose state occupational licenses can be revoked or suspended without a judicial hearing. When the right to continue practicing a trade or profession is at stake, only attorneys are denied their day in court.

Since the California Constitution provides that the Supreme Court cannot render a judgment without giving the parties a chance to argue their case to the Court and have the concurrence of four judges present at the argument, and since the Constitution further requires the Court to issue a written opinion giving reasons for their decision that determines a "cause", the position of the Cal. Supreme Court that

an order of disbarment is not a judgment and does not determine a "cause" results in a violation of due process and equal protection under the Fourteenth Amendment.

2. Whether the Order of March 22, 2000 constituted a forfeiture and a Constitutional violation of the Eighth Amendment.

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

PROCEEDINGS BELOW

The Order of March 22, 2000 of the Cal. Supreme Court disbarring petitioner is set forth at Appendix 1 and is unreported.

The Petition for Writ of Review filed February 3, 2000 in the Cal. Supreme Court is set forth at Appendix 2.

The Decision of the State Bar hearing judge is set forth at Appendix 3.

The Opinion on Review is set forth at Appendix 4.

Appendix 3 and Appendix 4 were the only orders of the State Bar which resulted from the one Notice of Disciplinary Charges, bearing the case numbers: 92-0-20339, 93-0-16504, 94-0-13793, 93-0-19337.

JURISDICTION

Jurisdiction is invoked pursuant to 28 USC sec. 1257 on account of the Cal. Supreme Court's Order of March 22, 2000.

CONSTITUTIONAL & STATUTORY PROVISIONS

Cal. Constitution,

Art VI, Sec. 2. Supreme Court

> The Supreme Court consists of the Chief Justice of California and 6 associate justices. The Chief Justice may convene the court at any time. Concurrence of 4 judges present at the argument is necessary for a judgment.
>
> An acting Chief Justice shall perform all functions of the Chief Justice when the Chief Justice is absent or unable to act. The Chief Justice or, if the Chief Justice fails to do so, the court shall select an associate justice as acting Chief Justice.

Sec. 14. Publication of opinions

> The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.
>
> Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

Cal. Code of Civil Procedure, sec. 577

> A judgment is the final determination of the rights of the parties in an action or

proceeding.

STATEMENT OF THE CASE

The State Bar served petitioner with a Notice of Disciplinary Charges, which resulted in a hearing and a recommendation for disbarment. App. 3. The Review Department rubber-stamped this recommendation. App. 4.

Petitioner then petitioned the California Supreme Court on February 3, 2000 for a Writ of Review, App. 2, contending that he did not receive a fair hearing, that the decision was not supported by the weight of the evidence, and that the recommended discipline was not appropriate in light of the record as a whole.

On March 22, 2000 the California Supreme Court issued an Order disbarring petitioner without any written reasons and without affording him an opportunity for oral argument before said Court. App. 1.

Because of this Order the instant Petition is filed.

REASONS FOR GRANTING THE WRIT

I

THE ORDER OF MARCH 22ND FAILS TO CONFORM TO THE REQUIREMENTS OF THE CALIFORNIA CONSTITUTION.

The California Constitution, Art. VI, sec. 2, provides that the Supreme Court may not render a judgment unless it has given the parties a chance to argue their case to the

members of the Court. It also requires at sec. 14 that the Court issue a written opinion giving reasons for any decisions that determine a "cause." Since an order of the Court disbarring an attorney should be considered a judgment, as explained by Justice Kennard in her dissent in the Rose case, supra, 22 Cal.4th at 460, and because such an order determines a "cause," the Constitution does require that the Court hear argument and issue a written opinion with reason stated before ordering an attorney disbarred. The Supreme Court did neither by its Order of March 22nd, disbarring Petitioner.

Cal. Code of Civil Procedure, sec. 577, provides that "A judgment is the final determination of the rights of the parties in an action or proceeding." As the majority opinion in Rose points out, "this Court [referring to the California Supreme Court] has exclusive original jurisdiction to discipline attorneys" and a disbarment order "amounts to an exercise of our jurisdiction and a judicial determination on the merits." 22 Cal.4th at 446, 93 Cal.Rptr.2d at 310 (underlining added). Accordingly, an attorney disciplinary proceeding is a judicial proceeding, and a disbarment order is a judgment because it is the final determination of the attorney's rights.

Since the Cal. Constitution gives litigants a right to oral argument before judgment and since a disbarment order is a judgment rendered by the Supreme Court, it necessarily follows that the petitioner did have a right to oral argument and a written opinion of the Court before the disbarment order was filed.

Since the Cal. Constitution at Art. VI, sec. 14 provides that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated," the California Supreme Court's decision determining

petitioner's cause should be in writing with reasons stated. An analysis of the Supreme Court's reasoning in the Rose case, supra, which purported to eliminate this Constitutional requirement, is indicated.

The background of the California attorney discipline system was set forth in Hirsh v. Justices of Supreme Court of California, 67 F.3d 708, 711 (9th Cir. 1995):

> "Under California law, attorney disciplinary matters are handled by the State Bar Court ('Bar Court'), an administrative agency affiliated with the California State Bar Association ('State Bar'). Cal. Bus. & Prof. Code, sec. 6086.5. The Bar Court is divided into a Hearing Department and a Review Department. Id. secs. 6079.1, 6086.65. Disciplinary proceedings are commenced by serving the accused attorney with a Notice to Show Cause. The Hearing Department then conducts a formal adversarial hearing during which the accused attorney and a State Bar prosecutor present evidence before a Bar Court judge. The Hearing Department makes findings and a recommendation regarding appropriate discipline. The attorney may appeal to the Review Department, which reviews the Hearing Department's findings de novo and makes its own recommendation. The attorney may then file a petition for review with the California Supreme court. Id. sec. 6082. The Supreme Court either grants review and issues a final order or denies review, in which case the Bar Court's recommendation is filed as an order of the Supreme Court. Id. sec. 6084. Cal. Court

> Rule 954. Throughout this process, the Supreme Court retains inherent jurisdiction over attorney discipline matters. Id. 951(g)."

In In re Attorney Discipline System, 19 Cal.4th 582, 600, 79 Cal.Rptr.2d 836, 846 (1995), the Cal. Supreme Court delineated the bar's role as follows:

> "the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of this court, which nonetheless retains its inherent judicial authority to disbar or suspend attorneys. (citations) (Saleeby v. State Bar (1985) 30 Cal.3d 547, 557...
>
> * * * *
>
> "'(The State Bar) is not an administrative board in the ordinary sense of the phrase. It is sui generis. In disciplinary matters... it proceeds as an arm of this court... It follows that in matters of discipline and disbarment the State Bar is but an arm of this court, and that this court retains its power to control any such disciplinary proceeding at any step.'"

This case involved the issue as to the power of the Supreme Court to impose fees on licensed attorneys to fund a disciplinary system. It was found to be appropriate.

With this background in mind, we again turn to the Cal. Constitution, Art. VI, sec. 14, which provides that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

If an attorney discipline proceeding is a "cause" that is determined by an order of disbarment, such as the March 22nd Order, then the Supreme Court's Order necessarily is a decision of the Court which must be explained in a written opinion. That Order contained no such explanation.

The majority in the Rose case conceded that "cause" means a proceeding in court, a suit or action, but concluded that a disbarment proceeding is not within this definition because it is sui generis. 22 Cal.4th at 453, 93 Cal.Rptr.2d at 314. The dissent by Kennard, J. disagrees with this conclusion: "An attorney suspension or disbarment is a 'proceeding in court' because, as the majority explain it is a proceeding in which this court exercises original jurisdiction and 'renders decisions or orders imposing discipline.'" 22 Cal.4th at 462, 93 Cal.Rptr.2d at 322.

That dissent further points out:

> "This court, acting through the State Bar, assumes the duty of enforcing our attorney discipline orders. When this court undertakes to exercise original jurisdiction in a proceeding, and in so doing makes a final judicial determination of the parties' rights in that proceeding, embodied in an enforceable order, we have necessarily made a decision that determines a cause within the meaning of the state Constitution's written opinion requirement.

* * * *

> "Decisions in attorney suspension and disbarment matters determine causes and therefore must be in writing with reasons stated." 22 Cal.4th at 464, 93 Cal.Rptr.2d at 323.

Justice Kennard zeroed in on the premise for the majority's conclusions, viz.

> "The majority asserts that this court can no longer spare the time and resources required to hold oral argument and write an opinion in every attorney suspension and disbarment proceeding. Even if the majority is correct, as it may be, the proper solution is not an expedient but unreasonable construction of the state Constitution to deny attorneys the privileges granted to holders of all other occupational licenses." 22 Cal.4th at 464, 93 Cal.Rptr.2d at 324.

She further points out that under Bus. & Prof. Code, sec. 6082, review of attorney discipline recommendations can be by either the Supreme Court or a Court of Appeal and with 90 justices of courts of appeal, it would not unduly burden their workload since there were only 40 cases in which attorneys sought review in 1990.

The dissent by Brown J. in the Rose case points out that "this court is the only **judicial** body involved in the attorney discipline process. An attorney's petition for review to this court marks the first and only time in the disciplinary process that article VI judges are asked to enter the case. For that reason and for that reason alone, our decision, even if it is a summary denial of review, necessarily decides a cause." 22 Cal.4th at 468-9, 93

Cal.Rptr.2d at 326. (bold and underlining added)

She points out that "an attorney facing suspension or disbarment from the right to practice her profession gets no hearing, no opportunity for oral argument, and no written statement of reasons -- from this or any other Article VI court.... Instead, she gets a summary denial of review --, the one-line order." 22 Cal.4th at 466, 93 Cal.Rptr.2d at 324.

She concludes:

> "At the heart of the majority opinion is the supposition that review by any other name is still review and passes constitutional muster; that due process is satisfied by any process, however much the decisionmakers may be driven by bureaucratic agendas or political ties. In this corner of the law, at least, we seem to be presiding over a union of the legislative and judicial components of government. It may be efficient; it certainly isn't pretty. And because it seems antithetical to the constitutional design, I dissent." 22 Cal.4th at 470, Cal.Rptr.2d at 327.

II

THE MARCH 22ND ORDER DISBARRING PETITIONER VIOLATES DUE PROCESS AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

> "It is well settled that the state 'cannot exclude a person from the practice of law or from any other occupation in a manner or for

> reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.' (Schware v. Board of Bar Examiners (1957) 353 US 232, 238-239)..." Conway v. State Bar, 47 Cal.3d 1107, 1138 (Kaufman, J. dissenting).

The conclusion of the majority in the Rose case, supra, does just that.

Justice Kennard's dissenting conclusion in Rose, supra, spells this out:

> "The state government grants individuals licenses to practice a variety of trades and professions, including those of attorney, doctor, dentist, veterinarian, real estate broker, contractor, motor vehicle dealer, and cosmetologist. In general, proceedings to suspend or revoke those occupational licenses occur before administrative tribunals and result in administrative orders that the licensee may challenge by a proceeding in superior court for administrative mandate. (Code of Civ. Proc. sec. 1094.5) In that superior court mandate proceeding, the licensee has the right to a court hearing and, upon request, to a written decision. (Id., secs. 632, 1094.5).
>
> "But attorneys do not have recourse to administrative mandate proceedings because their licenses are suspended or revoked not by an administrative determination, but by this court's orders. As a consequence, under the majority's decision today, only attorneys can

have their licenses suspended or revoked without a judicial hearing and a written judicial decision. This disparate treatment of attorneys raises serious due process and equal protection questions..." 22 Cal.4th at 465, 93 Cal.Rpt.2d at 323-4.

Even the Cal. Supreme Court conceded in Conway v. State Bar, supra, Cal.3d at 1113 that attorneys are entitled to due process:

> "We note at the outset that petitioner plainly has a property interest in the right to practice his profession that cannot be taken from him without due process. (Barry v. Barchi (1979) 443 US 55, 64..."

As pointed out in the recent Troxel v. Granville, ___ US ___ (6/5/00):

> "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the Amendment's Due Process clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' Washington v. Glucksberg, 521 US 702 719 (1997). The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interest. Id. at 720, see also Reno v. Flores, 507 US 292, 301-302 (1993)." See, Village of Willowbrook v. Olech, ___ U.S. ___ (2/23/00).

There is no doubt but that the California Supreme Court's interpretation of the Constitution in the Rose case, and in this one, constitutes a deprivation of Wyshak's due process and particularly, equal protection under the 14th Amendment.

III

THE ORDER OF MARCH 22ND CONSTITUTED A FORFEITURE AND A VIOLATION OF THE EIGHTH AMENDMENT

Based on the foregoing authorities, there is no doubt that the Order of March 22nd effected a forfeiture of petitioner's property right in his license to practice law in violation of the Eighth Amendment of the Constitution. Cf., Conway v. State Bar, 47 Cal.3d at 1113, supra.

CONCLUSION

This Petition for Writ of Certiorari should be granted in light of the California Supreme Court's forced and irrational interpretation of the Constitution.

Respectfully submitted,

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June 20, 2000

Appendix 1

SBC No. 92-0-20339, 93-0-16504,
93-0-19337; 94-0-13793
S084070

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

In re ROBERT H. WYSHAK on Discipline

Supreme Court
FILED
March 22, 2000

Frederick K. Ohlrich Clerk

Deputy

Petition for writ of review is denied.

It is hereby ordered that Robert H. Wyshak, State Bar member number 20132, be disbarred from the practice of law and that his name be stricken from the roll of attorneys. He is also ordered to comply with rule 955, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar.

* See Business and Professions Code section 6126, subdivision (c).

/s/ George
Chief Justice

Appendix 2

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In the matter of ROBERT H. WYSHAK, A Member of the State Bar No. 20132	Case Nos. 084070 State Bar Court Case No. 92-0-20339

VERIFIED PETITION FOR WRIT OF REVIEW OF THE DECISION OF THE STATE BAR COURT & OF THE OPINION OF THE REVIEW DEPARTMENT & SUPPORTING BRIEF

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2. **Even if such allegation was not required, did OTC fail to offer independent proof of a conspiracy between Wyshak and Eggleston as a basis for the introduction of the hearsay statements of co-conspirators?** . . 16

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3. **Even if such allegation was not required, did OTC fail to prove that:** 16

i) the declarant was participating in the conspiracy when making the statement 16

ii) the statement furthered the conspiracy's objective 16

iii) at the time of the statement, the declarant was participating in the conspiracy; and 16

iv) the statement was in furtherance of the conspiracy? 16

4. **Should the hearing judge have admitted in evidence the Wyshak Responses to the Second Set of Interrogatories in the Pennington matter, Ex. Y id., to show that Wyshak had complied with a discovery order re Count 6?** 16

5. **Did the court erroneously determine culpability in Count 6, since Wyshak's objection to production of documents on 5th Amendment grounds in the Pennington matter was appropriate in view of Judge Letts' remarks concerning criminal, unethical conduct?** 17

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6. Should the hearing judge have admitted in evidence Ex. B id., the Assignment of Securities reflected on the brokerage account statement, Ex. C, to prove that Wyshak was holding as custodian trustee in the Pennington matter a source for the collateral securing the unpaid purchase price to prove his state of mind, and to impeach Fedorow's testimony that there were no bonds? 17

7. Should the hearing judge have dismissed Count 16 in which he found culpability based on his erroneous finding that Wyshak did not hold a "cash grant," when in fact the uncontradicted evidence showed that he did? 17

8. Should the hearing judge have dismissed Count 19 in which he found culpability based on his erroneous finding that Wyshak misrepresented that he was holding $300,000 in trust, when there was no evidence that he had ever made such a misrepresentation, and only represented that he was holding a "cash grant," in substance, a promissory note? 17

9. Should the hearing judge have dismissed as duplicative Counts 7, 9 or 12, as they are based on the same facts: the allegedly false declarations of Linda Tracy and Connie McMillian, in the unlawful detainer action? 17

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12. Should the hearing judge have dismissed Count 14, which alleged a conflict in interest for Wyshak to represent Tracy in Zwiebel's unlawful detainer, because Zwiebel testified that in February 1992 he asked Wyshak to write a letter to Coldwell Banker (regarding brokerage commissions) which was contradicted by Wyshak's testimony that he never had any contact or communication with Zwiebel after January 1992 until August, 1992 when Zwiebel filed suit against Tracy to evict her (see Ex. 46)? This was confirmed by Wyshak's handwriting expert that the Wyshak signature on that letter to Coldwell Banker, Ex. 28, on what appeared to be Wyshak letterhead was not that of Wyshak. The objection to Ex. 28 should have been sustained, as it was irrelevant with insufficient authentication? 17

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13. Should the hearing judge have dismissed Count 15, which alleged that Wyshak failed to report the imposition of $80,000 sanctions to the State Bar, when the case law requiring him to do so, In the Matter of Y (Review Dept. 5/5/98) (4 Cal. St. Bar Rptr. _____) was not reported until years after the misconduct? 18

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15. Did the hearing judge erroneously reject Ex. FF id., the Connie McMillian declaration in the unlawful detainer, which proved that Becki Fedorow had prepared it, as shown by the "post-it" attached, directing "Bob" to have it executed, which was signed "Becki"? 18

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16. Did the hearing judge erroneously reject Ex. N id., a Linda Tracy declaration of February 27, 1993, prepared and authenticated by her new attorney, S. Levenberg, which proved that she had in fact been sexually harassed by Zwiebel, when there was no specific evidence that she had denied being sexually harassed other than Zwiebel's testimony? . . . . . .

17. Whether OTC should have been estopped to present secondary evidence regarding the allegations of sexual harassment of Tracy and the attempted bribery by Zwiebel and his counsel, because OTC refused to produce Tracy or McMillian or provide Wyshak's counsel with their current addresses and telephone numbers and they presented no evidence of their unavailability? 18

18. In the absence of a contrary handwriting expert on behalf of OTC, did the hearing judge erroneously reject the opinions of Wyshak's expert that the Wyshak signatures on the purchase and trust documents in the Mollan-Masters, Freund and Pennington matters and the Wyshak letterheads in the Zwiebel matter, did not bear the genuine signature of Robert Wyshak, based on 30 exemplars provided by Wyshak? 18

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In the matter of	)	Case Nos. 084070
	)	
ROBERT H. WYSHAK,	)	State Bar Court
	)	Case No. 92-0-20339
A Member of the	)	
State Bar No. 2013[illegible]	)	
	)	

VERIFIED PETITION FOR WRIT OF REVIEW
OF THE DECISION OF THE STATE BAR COURT &
OPINION OF THE REVIEW DEPARTMENT

TO THE HONORABLE CHIEF JUSTICE & ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner Robert H. Wyshak, pursuant to Rule 952(a) and 954(a) of the California Rules of Court respectfully requests this Court to issue its writ of review of the State Bar Court's Order recommending disbarment from the practice of law.

February 3, 2000

/s/
ROBERT H. WYSHAK

GROUNDS FOR REVIEW

Review is required as the Decision of the State Bar Court and Opinion of the Review Department are not warranted for any of the following reasons:

(1) petitioner did not receive a fair hearing;

(2) the decision is not supported by the weight of the evidence; or

(3) the recommended discipline is not appropriate in light of the record as a whole.

JURISDICTIONAL STATEMENT

This Petition is timely filed as the Record of Discipline, recommending disbarment, was filed in this Court on December 6, 1999, Rule of Court 952(a).

INTRODUCTORY STATEMENT

The facts underlying the Notice of Disciplinary Charges filed by the Office of Trial Counsel (OTC) of the State Bar is premised on a unique set of facts different from any other disciplinary proceeding. It is largely bottomed on the "identity theft" of Robert Wyshak by the dishonest conduct of a former felon, George Eggleston. (See, Lee v. Sup. Ct. _____, C.4th _____, (1/6/00) (2000 D.A.R. 205).

Wyshak, now 76 years old, had been practicing with an unblemished record since 1948, over 50 years, with no record of prior discipline. Using the new technology of computers and desktop publishing, Eggleston manufactured

Wyshak letterheads and trust instruments and contracts, on which he forged Wyshak's signature. There is no evidence whatsoever that Wyshak prepared or participated in the preparation of the various agreements, escrow instructions or escrow statements involved herein, contrary to the findings below.

Not one of the complaining witnesses who testified had any contact or communication or conversations with Wyshak, prior to entering into the agreements and proposals manufactured by Eggleston. Their testimony is consistent with Wyshak's, and there is no evidence to the contrary.

None of the complaining witnesses testified that Wyshak was directly involved in Eggleston's schemes or that he had any initial contact with the property owners or participated in the deals which Eggleston negotiated. After the deals came to Wyshak's attention following the closings, he failed to advise the sellers that his name had been forged and that he knew nothing about the transactions, but decided to act as trustee, since this was what the parties had agreed to. He demanded that Eggleston stop using his name, but this did not stop him.

Eggleston was not called to testify at the trial.

The hearing judge relied on Evid. Code § 1223 (which permits receipt of hearsay statements made by a person participating in a conspiracy if the statement was made prior to or during the conspiracy in furtherance of the conspiracy) to allow numerous hearsay statements of persons who were never called as witnesses in the case, to support his conclusion that Wyshak participated in a conspiracy with Eggleston in his schemes.

To support his finding that there was such a conspiracy, the hearing judge relied on only the very hearsay statements which he received in evidence over Wyshak's objections, without independent proof of the conspiracy. Wyshak never had the opportunity to examine these witnesses and this admission of the out-of-court declarations violated due process and his right of confrontation. (cf. Lilly v. Virginia, ____ US _____, 144 L.Ed.2d 117 (1999)).

The hearing judge made these findings despite the fact that the Notice of Disciplinary Charges never used the word "conspiracy" and did not charge Wyshak with participating in a conspiracy. Wyshak had no notice prior to trial that OTC and the hearing judge would rely on an uncharged conspiracy to support their recommendation for disbarment. See, Van Sloten v. State Bar, 48 C.3d 921, 929 (1989). The hearing judge allowed these hearsay declarations in evidence over the repeated objections of Wyshak's counsel.

In this case in which Wyshak was charged with specific violations of the Rules of Professional Conduct and the Business and Professions Code, the trial became without notice a conspiracy case contrary to the Rules of Procedure of the State Bar. Rule 101(b)(2) provides that the Notice of Disciplinary Charges should "contain a statement of facts constituting the alleged violations in sufficient detail to permit the preparation of defense." (See, First and Second Affirmative Defenses in Wyshak Response to the Notice). This was not done.

Alternatively, should the Court conclude that the shift of strategy and proof by the Office of Trial Counsel was proper, there was insufficient evidence introduced by OTC to establish a conspiracy between Wyshak and Eggleston by clear and convincing evidence or at all. Since there was no

independent proof of a conspiracy, the alleged hearsay statements of a "co-conspirator" should have been excluded and Wyshak's objections thereto sustained.

In some instances the hearing judge admitted numerous hearsay statements on the theory that they constituted adoptive admissions against Wyshak under Evid. Code §1221. He received this evidence, despite the fact that none of the statutory safeguards were proved.

Although the hearing judge dismissed 11 of the 22 charges and found culpability on 11 of them, he based his ultimate recommendation for disbarment on the hearsay statements of the accusers Wyshak was never given the opportunity to confront and on additional uncharged conduct which he found constituted aggravating factors. The Review Department's Opinion (App. #2) rubber stamped the hearing judge's Decision (App. #1).

A careful examination of the record will show that culpability was not proved by clear and convincing evidence, but rather that the judge based his recommendation for disbarment on hearsay and innuendo, which was never charged and improperly admitted, and on hearsay documents which he relied on, although they were not received for the truth of the matters asserted.

The only benefits derived by Wyshak from these transactions were escrow fees for handling the escrows, and nothing else.

STATEMENT OF FACTS

I.

PENNINGTON TRANSACTION

Counts 1 through 6 involve a real estate purchase agreement for property owned by William Pennington. This agreement was presented, negotiated, and executed solely by Eggleston on behalf of Centurion Trust. Wyshak was named as escrow holder and custodian trustee without his knowledge or authority. This was uncontradicted. Neither Pennington nor Eggleston testified at the hearing below to contradict this. On close of escrow, Pennington delivered an Assignment of Leasehold, rather than a fee interest in his property. This was the basis for a cross-claim in the suit Pennington filed, alleging a breach of contract, etc.

Pennington filed an action in Federal District Court against Eggleston, Wyshak and others prior to any default under the agreement in an attempt to undue the transaction. Counts 1 through 6 involve this transaction and lawsuit. (Ex. 13, Pennington Trust v. Centurion Trust et al., 2d Am. Cpt).

Eggleston's purchase agreement provided that the security for the unpaid purchase price, after a $340,000 downpayment, would be the scheduled distributable cash income from a portfolio of bonds, with the assignments of such securities held by Wyshak as custodian trustee. District Judge Letts, to whom the case was assigned, testified below that he did not reach any conclusion about the propriety of the transaction, only, that he felt the transaction was difficult to understand and different from anything he had seen in the past. (RT II, 87). The case settled on the eve of trial by the other defendants, (Ex. AA), but a default judgment was

entered against Wyshak (see, RT V, 93-97 for reason). In a chambers' conference the judge said that he felt that the transaction had all the earmarks of criminal fraud. (RT V, 91), because he misunderstood the import of W's response as to whether he had possession of the portfolio of securities. Wyshak responded that he did not have "possession," and this was because the bonds were held in a brokerage account.

As a result of the judge's remark, Wyshak asserted his 5th Amendment privilege against self-incrimination and objected to the production of any documents. (RT V, 91).

The hearing judge dismissed Counts 1 through 5 for lack of evidence to support the charges, but found Wyshak culpable in Count 6 for failing to comply with a court order to answer interrogatories and to produce documents. (B&P §6103). Although Ex. Y id, Wyshak's Responses to Plaintiff's Second Set of Interrogatories, dated February 1, 1993, was offered to prove Wyshak had complied with the Court's Order, the hearing judge refused to admit it as hearsay and found it to be irrelevant. (RT VII, 14). He further refused to allow any argument on the matter. The Court Order which was alleged to have been violated was not received in evidence.

In the course of a deposition, Wyshak at Eggleston's request stupidly lied about Eggleston being his paralegal and director of trust services. This was admitted below, although it was patently immaterial to the issues. Pennington ultimately recovered his property.

II.

ZWIEBEL UNLAWFUL DETAINER

Counts 7 through 15 of the Notice largely allege that Wyshak harmed the reputation of Dirk Zwiebel by allegations in litigation which he knew or should have known to be false, that he submitted to the Court declarations containing such statements, that he intentionally misled the court, and that he maintained an action known to be without merit.

The facts underlying these allegations are subject to substantial dispute, and largely concern the relationship between Linda Tracy and Zwiebel.

Wyshak first met Zwiebel in late January 1992, when he and a lady friend went to the Zwiebel home in Monrovia to see if he would be interested in leasing the property. After a 15-20 minute visit, they left and Wyshak said he would call Zwiebel if there was any interest in leasing the property. Wyshak did not call him back. During the meeting, Wyshak testified that after he looked the place over, the only matters of a personal or background nature that were discussed was the fact that Wyshak and his friend attended the Lake Avenue Congregational Church in Pasadena, which Zwiebel said he also attended. Wyshak did not, and would have been a fool, to misrepresent that he had been a federal judge, as Zwiebel testified. (RT III, 51). Apparently, the hearing judge believed Zwiebel's testimony.

Wyshak testified (RT VI, 103-6) (Ex. 146) that **he never saw or conversed with Zwiebel between January and August, 1992**, when he appeared in Pasadena court representing Linda Tracy, who was named as a defendant in Zwiebel's forcible detainer action. This is directly contrary

to Zwiebel's testimony as to frequent contacts with Wyshak. After Tracy's demurrer was sustained (Ex. DD), Zwiebel dismissed the action. Thereafter with new counsel, Emanuel Barling, Jr., Zwiebel filed an unlawful detainer action in the same court against Tracy (Register, Ex. 32) to recover possession of Zwiebel's house on Arroyo in Pasadena, which Tracy was occupying under a lease (Ex. 148).

Wyshak was assisted by co-counsel, Gary Spritz and a paralegal, Becki Fedorow, who had recommended Spritz to him. Spritz was present in most of the Pasadena proceedings and actively participated in preparing, reviewing, and presenting witnesses and pleadings. He was not mentioned in the Decision below or the Opinion on Review, or was he subject to disciplinary proceedings. Fedorow, on the other hand, was the primary OTC witness, testifying to numerous hearsay statements of Eggleston regarding the fabrication of charges against Zwiebel of his sexual harassment against Linda Tracy.

Wyshak testified that to this day he has no knowledge that the sexual misconduct was not true. (RT VI, 4). Those allegations were set forth in detailed declarations of Linda Tracy, Connie McMillian, her friend, and Gorton Demond in an Opposition to a Motion for Summary Judgment filed in the unlawful detainer prepared by Fedorow (RT VI, 113) (Ex. 110). OTC failed to produce both Tracy and McMillian at trial, and although Wyshak's counsel requested current addresses and telephone numbers for them, because she was unable to locate them, **OTC refused to comply**. Their in-court appearance would have provided the best evidence as who was telling the truth, as to the sexual harassment, rather than the hearsay statements.

BEST AVA

Despite Fedorow's attempt to incriminate others as the authors of those declarations, Wyshak produced a McMillian declaration with a "post-it" in Becki's handwriting, (Ex. FF id.), which requests "Bob" to have the declaration signed. This would identify Becki as the preparer; yet, the hearing judge refused to admit it, as he did with much of the exculpatory evidence offered by Wyshak.

After Barling induced Tracy to settle her litigation with Zwiebel after she fired Wyshak and Spritz, by scaring her by claiming he would help her with the purported investigations by the FBI and Police Department, she then sought other counsel, S. Levenberg. She gave him a declaration affirming the sexual harassment and attempted bribery charges by Zwiebel and his counsel Barling. (Ex. N. id). It is interesting that every single OTC witness who testified before the hearing judge, except Judge Letts and Mrs. Freund and her counsel, Finestone, had been or was a client of Barling's and those witnesses including Barling convinced the hearing judge by hearsay statements that the declarations filed in the unlawful detainer contained false allegations of sexual misconduct and attempted bribery by Zwiebel. The hearing judge's findings as to that falsity were based solely on the hearsay allegations which he allowed over objections into evidence as statements of co-conspirators and adoptive admissions.

Counts 11 and 12 were based on the findings that Wyshak made false claims of sexual advances against Tracy and her minor daughter when he filed a separate Superior Court action, a petition for injunction prohibiting harassment and an application for a temporary restraining order. (Ex. O).

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Prior to the ex parte hearing of that petition, Wyshak called Barling's office the morning before the hearing at or about 11 a.m., as a matter of courtesy (RT V, 121), to give him ex parte notice prior to noon as required by local court rules. He left a message as to time and place. When Barling did not return the call within 15 minutes, he telephoned Zwiebel and told him where and when the hearing would be, not knowing whether Barling would or would not be representing him.

Zwiebel testified that in this call Wyshak threatened him with contempt if he did not appear, a patent lie since any attorney would prefer not to have opposition for an ex parte application. The hearing judge found this to be a violation of Rule of Prof. Conduct 2-100 for communicating with a represented opponent, although Wyshak did not know whether Barling would be representing Zwiebel in this new proceeding. The temporary restraining order was granted, although both Zwiebel and Barling appeared at the hearing.

In Count 15, the hearing judge found that Wyshak failed to report the imposition of $80,000 in sanctions in the U.D. proceedings to the State Bar. Wyshak testified that he had notified the State Bar and was awaiting the determination of his final appeal of that order, which was only in June, 1997. He said he vigorously pursued that appeal not only because he thought the sanctions were a "gross miscarriage of justice," but because he contended that the underlying action for unlawful detainer could not be maintained in the Municipal Court for lack of subject-matter jurisdiction in unlawful detainer in light of Tracy's occupying under a written lease and because the value of the underlying property was over $600,000, exceeding the $25,000 jurisdictional limit of the Municipal Court, as did the sanctions judgment against Wyshak and Tracy for $80,000.

III.

MOLLAN-MASTERS TRANSACTION

Counts 16 through 18 involve a real estate purchase transaction for property owned by Rene Mollan-Masters, which was negotiated through her real estate agent solely by Eggleston on behalf of Centurion Trust. In the proposals drafted by Eggleston, he named Wyshak as trustee of a "cash agent" without his knowledge or authority (RT VI, 15). This "cash grant" instrument set forth the terms, the dates, and the amounts of the installment payments to be made toward the purchase price, in substance, a promissory note. However, it provided the seller with no security such as a deed of trust. Mollan-Masters testified as to advice from her counsel as to Wyshak's good reputation and Eggleston's documents and agreed to them (RT I, 23-5, 64-5). Ultimately, the property was lost in foreclosure.

The hearing judge, despite a lack of any contrary evidence to contradict Wyshak's testimony that he had nothing to do with the negotiations or execution of the papers prepared by Eggleston and that he did not authorize Eggleston to use his name and reputation in negotiating the deal found in Count 16 that Wyshak did not have the "cash grant" for $218,853 and that this was an act of moral turpitude in violation of B&P §6106 (Decision, 6). Wyshak did in fact have the "cash grant" instrument. (RT VI, 22) (Ex. 34, 26-7) (Ex. 35, 8-9).

There was no evidence of any representation by Wyshak that he was holding cash rather than a "cash grant."

As pointed out in Ex. 46 there was a default in the payments required under the cash grant due to the failure of Ron Morganstern, Dan Kempka, Jeff Dachman and Becki

Fedorow to make the required payments and ultimately the property was foreclosed on.[1]

The hearing judge dismissed with prejudice Counts 17 and 18 for the reason that Mollan-Masters was not a client of Wyshak, since the charges and Rules relied on in the Notice referred only to "clients."

IV.

FREUND TRANSACTION

Counts 19 through 22 involve a real estate purchase transaction for property owned by Harold & Harriet Freund, which was negotiated solely by Eggleston on behalf of Wycliffe-Hereford Ltd. In the proposals drafted by him, he forged Wyshak's name and named him as trustee of a "cash grant" without Wyshak's knowledge or authority. This "cash grant" set forth the terms, the dates, and amounts of the installment payments to be made toward the purchase price, in substance, a promissory note. (Ex. 40, pp 00016-17). However, it provided the sellers with no security such as a deed of trust. The terms of the deal were negotiated by Eggleston with the Law Offices of Walter, Finestone & Richter, primarily with William Finestone. (Decision, 28). Apparently Eggleston rejected the suggestion of Christopher Tesar of that firm that the term "cash" be substituted for "cash grant," Ex. BB id., which the court refused in evidence, although it was authenticated by Finestone and clearly proved that the Freunds' representatives noted that difference.

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[1] Kempka and Fedorow were two of the witnesses who testified against Wyshak at the trial, both of whom were clients of Emanuel Barling.

The hearing judge, despite a lack of any contrary evidence to contradict Wyshak's testimony that he had nothing to do with the negotiations or execution of the papers prepared by Eggleston and that he did not authorize Eggleston to use his name and reputation in negotiating the deal, found in Count 19 that Wyshak did not have the cash grant for $300,000 and that this was an act of moral turpitude in violation of B&P §6106. Wyshak did in fact have the cash grant which he later turned over to the successor trustee, as the record shows.

Finestone filed a petition with the court to have the Law Offices of Robert Wyshak & Associates, Ltd removed as trustee as it was not a person within the meaning of the Probate Code. Wyshak did not appear at the hearing for lack of receipt of notice of the proceeding, and the firm was ordered removed as trustee in favor of Bank of America. At a further hearing to have Wyshak held in contempt, the court refused to hold him in contempt and ordered the cash grant to be delivered to Bank of America as successor trustee. (See Exs. 51, 56, 57, 60, 63). The cash grant was turned over to the bank.

No payments were made on prior encumbrances, and the property was lost in foreclosure due to Eggleston's chicanery. Counts 20 and 21 were dismissed with prejudice for the reason that the Freunds were found not to be Wyshak's clients.

QUESTIONS PRESENTED

1. Should the Notice of Disciplinary Charges have alleged a conspiracy between Wyshak and Eggleston, since the bulk of OTC's evidence was premised on co-conspirator hearsay exceptions? It failed to do so.

2. Even if such allegation was not required, did OTC fail to offer independent proof of a conspiracy between Wyshak and Eggleston as a basis for the introduction of the hearsay statements of co-conspirators?

3. Even if such allegation was not required, did OTC fail to prove that:

i) the declarant was participating in the conspiracy when making the statement;

ii) the statement furthered the conspiracy's objective;

iii) at the time of the statement, the declarant was participating in the conspiracy; and

iv) the statement was in furtherance of the conspiracy?

4. Should the hearing judge have admitted in evidence the Wyshak Responses to the Second Set of Interrogatories in the Pennington matter, Ex. Y id., to show that Wyshak had complied with a discovery order re Count 6?

5. Did the court erroneously determine culpability in Count 6, since Wyshak's objection to production of documents on 5th Amendment grounds in the Pennington matter was appropriate in view of Judge Letts' remarks concerning criminal, unethical conduct?

6. Should the hearing judge have admitted in evidence Ex. B id., the Assignment of Securities reflected on the brokerage account statement at Goldman Sachs, Ex. C, to prove that Wyshak was holding as custodian trustee in the Pennington matter a source for the collateral securing the unpaid purchase price to prove his state of mind, and to impeach Fedorow's testimony that there were no bonds?

7. Should the hearing judge have dismissed Count 16 in which he found culpability based on his erroneous finding that Wyshak did not hold a "cash grant," when in fact the uncontradicted evidence showed that he did?

8. Should the hearing judge have dismissed Count 19 in which he found culpability based on his erroneous finding that Wyshak misrepresented that he was holding $300,000 in trust, when there was no evidence that he had ever made such a misrepresentation, and only represented that he was holding a "cash grant," in substance, a promissory note?

9. Should the hearing judge have dismissed as duplicative Counts 7, 9 or 12, as they are based on the same facts: the allegedly false declarations of Linda Tracy and Connie McMillian, in the unlawful detainer action?

10. Should the hearing judge have dismissed as duplicative Count 10 or 11 for filing the petition for injunction against sexual harassment based on alleged false claims of sexual misconduct?

11. Should the hearing judge have dismissed Count 13 for communicating with Zwiebel to give him ex parte notice of a new Superior Court action, when

Wyshak had no way of knowing what counsel would be representing him in this new proceeding?

12. Should the hearing judge have dismissed Count 14, which alleged a conflict in interest for Wyshak to represent Tracy in Zwiebel's unlawful detainer, because Zwiebel testified that in February 1992 he asked Wyshak to write a letter to Coldwell Banker (regarding brokerage commissions) which was contradicted by Wyshak's testimony that he never had any contact or communication with Zwiebel after January 1992 until August, 1992 when Zwiebel filed suit against Tracy to evict her (see Ex. 46)? This was confirmed by Wyshak's handwriting expert that the Wyshak signature on that letter to Coldwell Banker, Ex. 28, on what appeared to be Wyshak letterhead was not that of Wyshak. The objection to Ex. 28 should have been sustained, as it was irrelevant with insufficient authentication?

13. Should the hearing judge have dismissed Count 15, which alleged that Wyshak failed to report the imposition of $80,000 sanctions to the State Bar, when the case law requiring him to do so, In the Matter of Y (Review Dept. 5/5/98) (4 Cal. St. Bar Rptr. _____) was not reported until years after the misconduct?

14. Did the hearing judge erroneously reject Ex. M id., the fax confirmation showing that the declaration of Connie McMillian, submitted in the Opposition to the Zwiebel Motion for Summary Judgment, Ex. 110, was in fact faxed to her in its entirety for review and execution, contrary to Fedorow's testimony that only the signature page was faxed to her and that the declaration had false allegations of sexual harassment?

15. Did the hearing judge erroneously reject Ex. FF id., the Connie McMillian declaration in the unlawful detainer, which proved that Becki Fedorow had prepared it, as shown by the "post-it" attached, directing "Bob" to have it executed, which was signed "Becki"?

16. Did the hearing judge erroneously reject Ex. N id., a Linda Tracy declaration of February 27, 1993, prepared and authenticated by her new attorney, S. Levenberg, which proved that she had in fact been sexually harassed by Zwiebel, when there was no specific evidence that she had denied being sexually harassed other than Zwiebel's testimony?

17. Whether OTC should have been estopped to present secondary evidence regarding the allegations of sexual harassment of Tracy and the attempted bribery by Zwiebel and his counsel, because OTC refused to produce Tracy or McMillian or provide Wyshak's counsel with their current addresses and telephone numbers and they presented no evidence of their unavailability?

18. In the absence of a contrary handwriting expert on behalf of OTC, did the hearing judge erroneously reject the opinions of Wyshak's expert that the Wyshak signatures on the purchase and trust documents in the Mollan-Masters, Freund and Pennington matters and the Wyshak letterheads in the Zwiebel matter, did not bear the genuine signature of Robert Wyshak, based on 30 exemplars provided by Wyshak?

19. Was it an abuse of discretion for the Review Department to have denied Wyshak's Motion to Augment the Record, etc. to show that Eggleston was incarcerated in state prison for "identity theft?"

20. Is approximately a year and a half suspension sufficient discipline in this matter?

21. Did the hearing judge erroneously rely on speculation and hearsay to find facts implicating Wyshak in Eggleston's schemes in the preparation of documents and negotiations with the complaining witnesses where there was no contrary evidence whatsoever in the record to support them, but was based merely on the judge's rejection of Wyshak's testimony?

ARGUMENT

I.

THE NOTICE OF DISCIPLINARY CHARGES SHOULD HAVE ALLEGED A CONSPIRACY BETWEEN EGGLESTON AND WYSHAK, AS A BASIS FOR THE INTRODUCTION OF HEARSAY, CO-CONSPIRATOR STATEMENTS

The Notice of Disciplinary Charges does not use or mention the word "conspiracy." Rule 101 of the Rules of Procedure of the State Bar provides in pertinent part as follows:

> "(b) The notice of disciplinary charges shall:
>
> * * *
>
> "(2) Contain a statement of facts constituting the alleged violations in sufficient detail to permit the preparation of a defense.

"(3) Relate to alleged facts to specific statutes, rules or court orders alleged to have been violated or to warrant the action proposed."

In his Response to the Notice, Wyshak pled two affirmative defenses, in effect a demurrer, that the Notice was deficient.

In Unruh v. Truck Insurance Exchange, 7 C.3d 616, 631 (1972) this Court pointed out:

> "To state a cause of action for conspiracy the complaint **must allege**" (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting." (Bold added)

In Orloff v. Metropolitan Trust Co., 17 C.2d 484, 488 (1941) this Court found the allegations of complaint insufficient.

> "To state a cause of action for conspiracy, **facts must be alleged** showing the formation and operation of a conspiracy and damage resulting from an act or acts one in furtherance of the plan. As the cause of action is for the damage suffered, and not the mere conspiracy, the complaint must state facts which show that a

civil wrong was one resulting in damage. (Mox Inc. v. Woods, 202 Cal. 675..." (Bold added)

Since OTC and the hearing judge used co-conspirator statements as the foundation for their findings, beyond the allegations of the Notice, those statements should not considered, as set forth infra.

II.

(A) EVEN IF A CONSPIRACY ALLEGATION WAS NOT REQUIRED IN THE NOTICE, OTC FAILED TO OFFER INDEPENDENT PROOF OF A CONSPIRACY AND WYSHAK'S OBJECTIONS TO THE HEARSAY SHOULD HAVE BEEN SUSTAINED.

The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan to commit a tortious act. The formation of a conspiracy depends on the formulation of a plan for joint action to effectuate a common purpose. Mere knowledge, acquiescence or approval of the act which is the basis of the conspiracy allegation is not enough to bring a person within a conspiracy; there must be an agreement to cooperate before a conspiracy is formed.

In Kidron v. Movie Acquisition Corp., 40 C.A.4th 1571, 1582 (1995), the court pointed out:

"While knowledge and intent 'may be inferred from the nature of the acts done, the

> relation of the parties, the interest of the alleged conspirators, and other circumstances" (Wyatt v. Union Mortgage Co., supra, 24 Cal.3d at p. 785).'"' (c)onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be some evidence of some participation or interest in the commission of the offense."' (Davis v. Superior Court (1959) 175 C.A.2d 8, 23"
>
> "The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." Ibid.

There is no competent evidence in the record whatsoever to support a finding that Mr. Wyshak participated in such a conspiracy.

The hearing judge admitted numerous hearsay statements on the theory that they were statements of co-conspirators in furtherance of a conspiracy. For example, he found that "in the two Zwiebel lawsuits, respondent conspired with the other named defendants to create lies about Dr. Zwiebel." (Decision, page 20, lines 19-20.) The

court further found that "In the Zwiebel matter, he [Mr. Wyshak] was an active part of a conspiracy to steal, commit forgery, suborn perjury and use the courts as a vehicle for those crimes." (Decision, page 34, lines 1-7.) Mr. Wyshak was not charged with participating in such a conspiracy and a finding that he was clearly violates due process.

Numerous exhibits were received in evidence based merely on the suggestion that Evid. Code §1223 was applicable. (RT VI, 7 et seq., RT III, 63), OTC urged applicability of this section on the ground that there had been a fraudulent conspiracy. (Ibid.). The court improperly agreed with this without any showing or proof of the essential elements of a conspiracy.

A party seeking to introduce evidence of a declarant's statement as the admission of a co-conspirator must introduce evidence to establish that (1) there is prima facie evidence that a conspiracy exists; (2) that the declarant was participating in the conspiracy at the time of the declaration; (3) the declaration was in furtherance of the objective of the conspiracy; and (4) at the time of the declaration, the party against whom the evidence is offered was going to or was participating in that conspiracy. Evid. Code §1223, People v. Hardy, 2 C.4th 86, 139 (1992).

In Castro v. Superior Court, 9 C.A.3d 675, 692 (1970), the court discussed the order of proof prior to allowing statements of co-conspirators:

> "Such declarations are not supposed to be admitted until after independent proof of the conspiracy... As a practical matter, the accused often is confronted with a hodge podge

> of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence of the conspiracy." In other words, a conspiracy is often proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that the prejudicial effects can be overcome by instructions to the jury, [citations omitted] all practicing lawyers know to be unmitigated fiction."

The court went on to further criticize the laws regarding evidence of conspiracies as follows:

> "Anyone even vaguely familiar with the substantive and procedural characteristics of conspiracy law must soon realize that there is no crime in our system of which -- in spite of all of our procedural safeguards -- an innocent person can so easily be found guilty; that there is no comparable legal situation where his freedom depends so precariously on the deeds and words of others over whom he has no control, on the ability

> of juries to perform impossible mental gymnastics and feats of memory, on the fortuitous outcome of fact -- finding based on ambiguous circumstantial evidence -- in short on factors quite unrelated to the issue of actual, personal guilt. The existence of no other crime offers such rewards for limiting one's behavior that 'which is unquestionably safe.'" Id. at 695-696.

The rules relating to conspiracy should be carefully applied. Here, no such safeguards were employed. Rather, in a case in which no conspiracy was charged, the hearing judge allowed numerous hearsay statements without ever requiring the necessary quantum of independent evidence to prove the existence of a conspiracy. Even assuming arguendo, that the Office of Trial Counsel should be allowed to put on uncharged evidence of a conspiracy, no conspiracy was proven by independent evidence and, thus, any so called co-conspirator's statements should not have been allowed. Most of the cases in which the statements of co-conspirators are discussed, arise in criminal proceedings, where the standard of proof is "beyond a reasonable doubt." Thus, before the statements of co-conspirators can be admitted, the conspiracy must be proved by the necessary quantum of proof. Here, no less should be required. As the court said in Giddens, 28 C.3d 67, 75 (1981), a person's right to practice his or her profession is sufficiently precious to surround it with a "panoply of legal protection." Thus, Mr. Wyshak should certainly be entitled to have the conspiracy allegations, if they are to be allowed at all, since they were

not alleged in the Notice of Disciplinary Charges, proved beyond a reasonable doubt before the statements of Eggleston and others who were unavailable for cross-examination are allowed into evidence. Thus, even given the confusing order of proof when a co-conspirator's statement is sought to be introduced, "the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy." People v. Geiger, 40 Cal. 643, 649 (1875). A hearing judge must instruct a jury to disregard conditionally admissible evidence unless it is persuaded of the existence of the preliminary fact. Everett v. Everett, 150 C.A.3d 1053, 1073, (1984).

In this matter, the hearing judge used the testimony of Barling, Zwiebel, Becki Fedorow and Dan Kempka to establish the purported conspiracy among Mr. Wyshak, Eggleston and unnamed others. Over Wyshak's objections, the hearing judge allowed testimony by Kempka that there was a meeting definitely in December 1992 at the Westwood Marquis where Mr. Wyshak, Mr. Tresh, Mr. Eggleston, Mr. Morganstern and Mr. Kempka were present in which Eggleston made comments about keeping Tracy close to the group, and that she should now make charges of sexual harassment against Zwiebel. (RT I, 122, 124). Those charges were already before the court as set forth in Ex. 115 id., pp. 4-5, filed **November** 9, 1992, contrary to Kempka's testimony that the charges were dreamed up in December, proving him wrong.

When Mr. Kempka was testifying about Eggleston's manufacturing fictitious trusts, again, over counsel's objections, the judge allowed the hearsay statements of Eggleston that he made up names of trusts from looking at maps of England. (RT 1, 127-128). Mr. Wyshak's counsel continually objected, however, the judge overruled her

objections. An example is the following exchange at RT 1, 128:

"MS. TABACHNICK: Objection. Hearsay, your Honor.

THE COURT: I think,under 1223 -- was your conversation with Eggleston just between the two of you or were any other people present?

THE WITNESS: Ben Morganstern was present.

THE COURT: I think it would be subject to a request later to strike on inability to establish a conspiracy by a preponderance I believe under 401, 402 of the Evidence Code. My recollection is that all that's necessary to establish conspiracy would be a preponderance.

MS. TABACHNICK: Your Honor, there's been no offer of proof that Morganstern was involved in a --

THE COURT: No. The conspiracy, the person doesn't have to be present when a co-conspirator is making the statement. That's the danger and the beauty of 1223 is that it does not require the presence of all the conspirators to be admissible.

MS. TABACHNICK: Your Honor, there's no charge of conspiracy--

THE COURT: You don't have to allege a conspiracy in a pleading document, either in civil or criminal, to bring in 1223."

The Office of Trial Counsel never alleged or proved Mr. Wyshak participated in a conspiracy to manufacture phony trusts.

The judge also allowed Becki Fedorow to testify to numerous hearsay statements regarding the Zwiebel matter based on the co-conspirator exception, over the objection of Mr. Wyshak's counsel. (RT IV, 7-8):

Q. (by OTC) Did either of them ever indicate to you why they were opposing that unlawful detainer?

A. Yes.

Q. Who said what?

A. Basically --

MS. TABACHNICK: Objection. Calls for hearsay as to what Eggleston said.

THE COURT: Well, I still think that what Mr. Eggleston said would fall within the conspiracy exception to the hearsay rule, what Mr. Wyshak said would be admissible as an admission of a party, and if Mr. Eggleston made comments to the witness in Mr. Wyshak's presence, then we're potentially dealing with authorized or adoptive admissions. So I think we have to have the foundation laid as to when and where these statements were made to see what potential exceptions are operative.

MS. GARY: Thank you, your Honor.

BY MS. GARY:

Q. I think the question pending was made a statement regarding that?

A. George Eggleston.

Q. And where was he -- were you present with him when he made the statement?

A. Yes.

Q. Was Mr. Wyshak present?

A. Yes.

Q. And what was the statement?

A. He basically told me that there were two pieces of property that he was handling for them and that he would refinance one property and had gotten them to sign a power of attorney and that he had forged another power of attorney to refinance the other piece of property so that they could get enough money, and that they had put Linda Tracy in there as a tenant and she was supposedly supposed to be paying rent. They told me that the Zwiebels knew about her living there. But the Zwiebels were in Israel at the time and that's all I know.

As the declarations attached to Ex. 110 show, Mr. Wyshak had nothing to do with the powers of attorney which were executed and notarized at Zwiebel's bank in Arcadia on February 28, 1992 (Ex. 149), without his knowledge or

presence.

None of this testimony should have been allowed as the conspiracy was never charged, pled, or proved.

(B) THE ADMISSION OF CO-CONSPIRATOR STATEMENTS DENIED MR. WYSHAK A FAIR HEARING.

While State Bar disciplinary proceedings are not considered to be either purely criminal, civil or administrative, an accused attorney is entitled to a guarantee of a fair hearing. Denial of such right is almost always reversible error. In the Matter of Cacioppo (Rev. Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 141. This means that even though all of the protections afforded persons accused with crimes are not necessarily available to an attorney charged with misconduct, attorneys accused of misconduct are offered specific protection under the Constitution when appropriate to do so. The facts of each case will determine whether a particular rule of civil or criminal law should be applied in State Bar proceedings to ensure due process. In the Matter of Respondent B, (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 437. For example, it is a fundamental constitutional and statutory requirement that an attorney must be given notice of all charges and a reasonable opportunity to prepare his defense thereto. In the Matter of Lazarus (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 397. Likewise, an attorney may assert the Fifth Amendment privilege against self-incrimination in response to specific questions, and no adverse inference may be drawn from such invocation. In the Matter of Frazier (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 697.

(C) NO FOUNDATION WAS LAID FOR THE HEARSAY STATEMENTS OF FEDOROW TO BE RECEIVED AS ADOPTIVE ADMISSIONS.

There are two requirements for evidence of another person's hearsay statement to be admissible against a party as an adoptive admission, Evid. Code §1221:

> (1) The party has knowledge of the content of the other person's statement; and
>
> (2) The party has, by words or conduct, adopted the statement or manifested belief in the truth of the statement.

Proof of a party's knowledge of another's hearsay statement is a crucial requirement of adoptive admissions. To prove knowledge there must be evidence that the statement was spoken loudly enough, and the party close enough for the inference to be drawn that the party heard the statement. See People v. Fauber, 2 C.4th 792, 805 (1992).

Once a party has knowledge of another person's statement, the party must use words or conduct indicating the party's adoption of; or belief in, the truth of the hearsay statement to be considered an adoptive admission. Evid. Code §1221.

Even if Fedorow's testimony is accepted as true, there is no foundation laid that Wyshak heard what Eggleston said and that he adopted it as true. Patently what she said Eggleston said was hearsay and not binding on Mr. Wyshak. Her testimony was hearsay and should have been stricken and excluded.

III.

THE SUFFICIENCY OF WYSHAK'S RESPONSES TO THE FEDERAL COURT'S DISCOVERY ORDER IN THE PENNINGTON MATTER SHOULD NOT BE DETERMINED IN THIS PROCEEDING, SINCE A BONA FIDE RESPONSE WAS MADE.

The hearing judge found culpability in Count 6 because Wyshak allegedly failed to comply with the Federal court's discovery orders. None of any such orders was introduced in evidence. Nevertheless, he was found culpable. (Decision, 14-5). Although the Decision indicates that a default was entered due to his failure to comply with discovery orders, the only direct testimony in that respect was by Wyshak (RT V, 93-97): that his default was entered because it appeared to the court that he was representing Eggleston at trial contrary to the judge's direction that he represent only himself.

Although the Wyshak Responses to plaintiff's Second Set of Interrogatories were offered in evidence (Ex. Y id.), the hearing judge refused to admit them as hearsay and irrelevant (RT VII, 14). After so ruling, the judge refused to allow argument on the matter.

If there was any issue as to the sufficiency of those Responses, it was up to the Federal court and not up to the hearing judge to make such a determination.

Clearly Ex. Y should have been received in evidence.

Count 6 should have been dismissed for lack of proof.

IV.

THE PROPRIETY OF WYSHAK'S OBJECTIONS TO THE PRODUCTION OF DOCUMENTS IN THE PENNINGTON MATTER, BASED ON 5TH AMENDMENT GROUNDS, SHOULD NOT BE DETERMINED IN THIS PROCEEDING.

After Judge Letts remarked that he felt that the matter had the earmarks of an illegal, criminal unethical fraud, Mr. Wyshak concluded that the most prudent response would be to object on 5th amendment grounds to the production of any documents. (RT V, 91). The Federal court never determined whether this was a sufficient response.

Yet, the hearing judge found culpability in Count 6 with no reason therefor (Decision, 15). Clearly, there was no clear and convincing evidence of culpability, particularly since no federal court discovery orders were introduced in evidence.

V

THE "CASH GRANT" HELD BY WYSHAK AS CUSTODIAN TRUSTEE FOR BOTH MOLLAN-MASTERS AND THE FREUNDS WAS IN SUBSTANCE A PROMISSORY NOTE, AND THERE IS NO EVIDENCE WHATSOEVER THAT WYSHAK MADE ANY REPRESENTATIONS OR MISREPRESENTATIONS TO MOLLAN-MASTERS, TO THE FREUNDS, OR TO THEIR REPRESENTATIVES.

The format of the "cash grant" in both Mollan-Masters and Freund is substantially similar. Copies thereof

are attached to the papers prepared, negotiated and executed by Eggleston, without Wyshak's authority or knowledge (Ex. 35, p. 8-9; Ex. 49, p. 8-9). There is no evidence whatsoever that any misrepresentation was made by or on behalf of Wyshak. To some extent, each seller had counsel who dealt only with Eggleston. (RT I, 23-25; RT II, 6, 8). When the law firm representing the Freunds wrote Eggleston and suggested that the word "cash" be substituted for "cash grant," (Ex. BB, id.), (which the hearing judge refused to receive in evidence, although authenticated by the senior partner, Finestone), Eggleston rejected the suggestion, as shown by the fact that the change was not made.

None of the settlement state nents submitted to the sellers represented that the escrow held cash. (Ex. 35, p. 0002; Ex. 56, p. 000016). In each instance, the statement showed the receipt of the "cash grant."

In retrospect, Wyshak admits that the proper course would have been to disassociate himself from Eggleston and advise the sellers of the lack of security for the purchase price. It was stupid not to have done so, even though as the hearing judge held, they were not his clients, and as a result **owed them no fiduciary duty**, prior to his becoming custodian trustee of the cash grant.

VI

COUNTS 7, 9, OR 12 AND COUNTS 10 OR 11 SHOULD BE DISMISSED AS DUPLICATIVE, EVEN IF THE DECLARATIONS OF LINDA TRACY AND CONNIE McMILLIAN WERE PROVED FALSE.

Counts 7, 9, 12 are all based on the same facts, i.e. that Wyshak filed the false declaration of Linda Tracy and

Connie McMillian to support Tracy's opposition to the motion for summary judgment in the unlawful detainer action. Each of these counts is based on the same facts.

It is well established that where facts underlying violations of two separate statutes or rules are the same, no additional weight should be given to the duplication in determining discipline. In the Matter of Katz (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 435.

In Katz, Respondent's endorsement of a client's false financial statement and misrepresentation that one of a client's companies was a successful business were willful violations of his duty to employ only such means as are consistent with the truth when representing clients and were dishonest acts involving moral turpitude. However, to the extent that the facts underlying both violations were the same, the Review Department gave no additional weight to the duplication in determining discipline. Even though the hearing judge found culpability on Count 7, 9 and 12, since they are all based on the identical conduct, additional weight should not be accorded the finding of these separate violations.

Likewise, it would be improper to consider any duplicative charges as aggravation. In In the Matter of Burns (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 430 as part of his plea in a criminal case, respondent admitted that he caused great bodily injury to another person. Thus, the Review Department found that the crime for which respondent was convicted necessarily involved severe injury and it would be duplicative to consider harm to the victim as a separate aggravating circumstance. Duplicative allegations of misconduct serve little if any purpose. Bates v. State Bar (1990) 51 Cal. 3d 1056, 1060, accord, In the Matter of Respondent P. (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr.

622, 634. Thus, it was error for the hearing judge to make three separate findings of culpability which were based on the same conduct.

Likewise, Counts 10 and 11 are based on the hearing judge's finding that Mr. Wyshak made false claims of sexual advances by Zwiebel against Tracy and her daughter when he filed a petition for injunction prohibiting harassment and an application for a temporary restraining order. Again, while the judge made two separate findings of culpability, each is based on the exact same conduct. Thus, rather than being treated as five separate instances of misconduct, it should be treated as two.

VII

THE HEARING JUDGE SHOULD HAVE RECEIVED IN EVIDENCE EX. B id. THE ASSIGNMENT OF SECURITIES, SHOWN ON THE BROKERAGE ACCOUNT STATEMENT, EX. C, TO PROVE THAT WYSHAK WAS HOLDING AS CUSTODIAN TRUSTEE, IN THE PENNINGTON MATTER, A SOURCE FOR THE COLLATERAL SECURING THE UNPAID PURCHASE PRICE, TO PROVE HIS STATE OF MIND, AND TO IMPEACH FEDOROW'S TESTIMONY THAT WYSHAK TOLD HER THERE WERE NO BONDS.

The court refused to receive Ex. B in evidence to show that Wyshak in fact believed he did have collateral as a source for the purchase price of the Pennington leasehold, and to further impeach Fedorow's testimony that Wyshak told her that there were no bonds. (RT VII, 2-3).

Refusal to receive this exhibit in evidence is evidence of the bias harbored by the hearing judge toward Mr. Wyshak. Other exhibits which would tend to exculpate Mr. Wyshak were in each instance excluded from evidence, e.g. Exs. M id., N id., Y id., BB id., FF id., and should have been received.

VIII

THE FACT THAT THE LETTER TO COLDWELL BANKER OF FEBRUARY 26, 1992 (EX. 28) APPEARED TO BE ON WYSHAK LETTERHEAD DOES NOT AUTHENTICATE THE SIGNATURE THEREON OR PROVE THAT IT WAS WRITTEN OR AUTHORED BY WYSHAK MERELY BECAUSE IT APPEARED TO BE ON WYSHAK LETTERHEAD.

OTC and Zwiebel put emphasis on Ex. 28 to prove that Wyshak did in fact purport to represent Zwiebel as his lawyer in February 1992. Wyshak, on the other hand, testified that he did not call or communicate with Zwiebel after looking at the Monrovia house in January until the following August. The hearing judge received this exhibit in evidence against the respondent over objection merely because it purported to be a Wyshak letterhead (RT V, 1-4, RT VII, 32-4). Wyshak testified that he did not prepare this letter, that it was not his signature on it, and that he had never talked to Zwiebel about the substance of it. (RT V, 103-4; RT VII, 120-1). This was confirmed by the handwriting expert that it did not bear Wyshak's signature.

Further evidence that it was negligently fabricated is that the Beverly Hills telephone numbers reflected thereon are not Wyshak's telephone numbers which he had used since the early 60s, (213) 272-1911, which are shown on

other letterhead exhibits.

Ex. 28 was not property authenticated, was irrelevant and should not have been received in evidence, and conclusively establishes Zwiebel's mendacity.

IX

WYSHAK'S TELEPHONE CALL TO ZWIEBEL TO PROVIDE EX PARTE NOTICE OF THE NEW SUPERIOR COURT ACTION TO ENJOIN SEXUAL MISCONDUCT WAS REASONABLE UNDER THE CIRCUMSTANCES.

The hearing judge found Wyshak culpable in Count 13 of communicating with Zwiebel by giving them ex parte notice of the hearing on a temporary restraining order in a new case, after he was unable to reach Mr. Barling, by telephone. Culpability on this count rests on whether Mr. Wyshak knew or should have known that the Zwiebels were represented by counsel in this new matter. The Petition for Injunction Prohibiting Harassment (Exhibit O) and the Order to Show Cause Re Harassment (Exhibit P) were filed as new matters. The captions show new case numbers separate and apart from the unlawful detainer action, Zwiebel v. Tracy (Exhibit U), which was already pending. Culpability on this count also rests on whether a reasonable attorney under the circumstances would have known that the Zwiebels were represented by Mr. Barling in the new matter. (See, Cal. State Bar Formal Opinion 1996-145). Mr. Wyshak testified that he did not know whether Mr. Barling would be representing the Zwiebels on this new matter, although he tried to reach him as a matter of courtesy. (RT V, 121-122). The fact that Barling might be representing the Zwiebels is not enough. The mere fact that an attorney may

know that a party will likely obtain counsel after a lawsuit is filed does not constitute "knowledge" under Rule of Professional Conduct 2-100. Jorgenson v. Taco Bell Corporation (1996) 50 C.A.4th 1398, 1401.

Although Barling advised Mr. Wyshak not to communicate with the Zwiebels **after** he heard that Mr. Wyshak had done so (Exhibit 23), by communicating with the Zwiebels, Mr. Wyshak was only attempting to ensure that they had notice of the hearing "as a matter of courtesy." (RT V, 121). When discussing the matter, the hearing judge admitted that if it had "been a new matter... if the person is not represented, you can talk to him under the Rules of Court." (RT VII, 82). However, the Decision does not reflect this analysis.

X

THERE WAS NO BASIS, LEGAL OR OTHERWISE, FOR THE HEARING JUDGE'S REJECTION OF THE WYSHAK HANDWRITING EXPERT'S TESTIMONY AND CONCLUSIONS.

Lynne Variano is an examiner of questioned documents. She holds two certifications in questioned documents, one with the Independent Association of Document Examiners and the other with the World Association of Questioned Document Examiners. (RT VIII, page 78, line 17 through page 79, line 11.) She is currently president of the Independent Association of Document Examiners, and is on the teaching staff for the World Association of Questioned Document Examiners. (RT VIII, page 80, lines 1 through 11.) The court took it upon himself to cross examine her qualifications, and finally concluded she was qualified.

Ms. Variano analyzed nine documents which contained Mr. Wyshak's purported signature which were introduced into evidence, and compared them to documents which contained Mr. Wyshak's genuine signature. She found the signatures on Exhibits D (RT VIII, 98-99) Exhibit 34 (RT VIII, 106), Exhibit 13 (RT VIII, 107), Exhibit 28 (RT VIII, 107) Exhibit 49 (RT VIII, 107), and Exhibit 49 (RT VIII, 108) were not signed by Mr. Wyshak. Ms. Variano found that the signatures on Exhibits 36 and 44 were tracings of Mr. Wyshak's signature and were not genuine. (RT VIII, 109-110).

Despite her conclusions, the hearing judge found that Ms. Variano's testimony "is of little value because no foundation was ever established that Respondent was the source of the known exemplars from which she relied upon to form the opinion he had not written a signature on the questioned documents." (Decision, page 23, lines 10 through 14.) The hearing judge further found that her testimony was irrelevant because "the evidence establishes Respondent acquiesced to Eggleston's signing Respondent's name to documents in several transactions" (Decision, 23), without any supporting evidence.

The judge's failure to consider Ms. Variano's testimony is error. First, Ms. Variano testified that she compared the questioned signatures with exemplars that were signed by Mr. Wyshak at or near the time of the documents. (RT VIII, 97). Thus, the judge's conclusion that there was no foundation for her testimony is not supported by the record. Second, Ms. Variano's testimony is anything but irrelevant. It corroborates Mr. Wyshak's testimony that when each of the initial transactions regarding the Pennington, Mollan-Masters, and Freund properties were negotiated, he knew nothing about them, did not participate in them, and signed no documents. There was **no evidence**

presented by the Office of Trial Counsel to contradict Mr. Wyshak's testimony that he knew nothing about the transactions until after they were negotiated and executed. In fact, not one of the complaining witnesses testified that they had any personal contact with Mr. Wyshak prior to or during the negotiations regarding their properties. Thus, Mr. Wyshak's testimony must be accepted as true. "Where an attorney's testimony is plausible and uncontradicted, it should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered." In the Matter of Cacioppo, supra at 137. Furthermore, the hearing judge's rejection of Mr. Wyshak's testimony does "not create affirmative evidence to the contrary of that which is discarded." In the Matter of Anderson, (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 785. What the hearing judge did here was to rely on inadmissible hearsay testimony to support facts when there was no direct admissible evidence to contradict the testimony of Mr. Wyshak.

Ms. Variano also concluded that Mr. Wyshak did not sign Exhibit 28, the purported letter from him to Coldwell-Banker on behalf of Zwiebel. Consistently, Wyshak testified to that as well. Nevertheless, the hearing judge relied on this exhibit for his conclusion that Mr. Wyshak represented Zwiebel prior to representing Tracy in the unlawful detainer matter without Zwiebel's informed written consent. (Decision, page 26, line 24 through page 27, line 2.) This was also error.

XI

THE OTC SHOULD HAVE PRODUCED LINDA TRACY AND CONNIE McMILLIAN TO TESTIFY TO THE SEXUAL HARASSMENT AND ATTEMPTED BRIBERY BY ZWIEBEL AND HIS COUNSEL, AS SET FORTH IN THEIR DECLARATIONS ATTACHED TO EX. 110, OR TO THE LACK THEREOF.

It is elementary Hornbook law that there is a presumption that the failure to produce a witness with relevant information means that such a witness's testimony would be adverse to the party's position. OTC bottomed the Zwiebel counts on the ground that the Tracy and McMillian declarations (Ex. 110) were false, that Wyshak knew they were false, and that Wyshak intentionally filed those declarations in the unlawful detainer action. There was no testimony from either Tracy or McMillian. OTC refused to provide Wyshak's counsel with current addresses and telephone numbers for them and counsel was unable to locate them. (Wyshak Review Dept. Br. p. 5, fn. 1).

The only evidence of falsity was the hearsay testimony of Barling and his clients Zwiebel, Kempka and Fedorow, all of whom were antagonistic and hostile toward Eggleston and Wyshak, having been named as defendants in other cases by Eggleston. The hearing judge relied heavily on Kempka's testimony regarding a meeting at the Westwood Marquis **definitely** in December 1992 attended by Wyshak, Eggleston, Tresh, Kempka and his partner Morganstern, to discuss a lawsuit in which Kempka and Morganstern were named. Wyshak denied being at such a meeting in December, and denied hearing or knowing of any discussions about the sexual harassment of Linda Tracy. The court overruled objections to such testimony on the grounds of §1223, a conspiracy between Eggleston and Wyshak, or as

adoptive admissions (RT I, 119-20), on the assumption that Eggleston discussed this and Wyshak was there and heard it and did not object. Later, the judge admonished OTC that she would have to establish the conspiracy between Eggleston and Wyshak or face the danger of having a lot of these statements stricken. (RT I, 129). As set forth supra, at p. 25, the subject of Zwiebel's sexual misconduct was mentioned in court filings earlier on November 9, 1992, not December. Despite the fact that no independent evidence aside from these hearsay statements was adduced to prove a conspiracy, the court never struck these statements.

Aside from the hearsay statements and conclusory opinions of Barling, Zwiebel, Kempka and Fedorow, the best evidence of whether the sexual harassment had occurred and whether Tracy or McMillian had recanted in Wyshak's presence, would have been their oral testimony. OTC never made a showing of unavailability and never explained why they had not been subpoenaed for the trial. The only appropriate conclusion is that they would have been adverse and would have contradicted the Barling group's successful attack on Mr. Wyshak.

XII

AFTER THE LAPSE AND EXPIRATION ON MARCH 15, 1992 OF THE CORTRUST AGREEMENT WITH ZWIEBEL OF JANUARY 21, 1992, (EX. 134), FOR FAILURE OF ZWIEBEL TO REFINANCE AND PERFORM, THERE WAS NO (AND OTC FAILED TO PRODUCE ANY) **AGREEMENT OR PROPOSAL WITH ZWIEBEL IN WHICH WYSHAK'S NAME WAS MENTIONED OR INVOLVED AS TRUSTEE OR OTHERWISE.**

At the bottom of the first page of Ex. 134, an

expiration date and deadline of March 15, 1992 is set forth. A condition for performance on the part of Cortrust was that Zwiebel should refinance. He did not, prior to that date, and that agreement then became a nullity.

OTC failed to produce any exhibit in which Wyshak's name was mentioned or set forth thereafter as trustee or otherwise. Zwiebel's testimony and assumption that Wyshak would be trustee of the funds from a future refinancing is only his bald assumption. There is nothing in the record to support it.

Furthermore, there is nothing in the record to tend to prove that Wyshak was privy to or had contemporaneous knowledge of Eggleston's proposals and dealings with Zwiebel. This is the reason that Wyshak failed to respond to Zwiebel's inquiries on his return from Israel, as he knew nothing about any refinancing. Ex. 146, a letter to Zwiebel of July 15, 1992 confirms this.

XIII

WITHOUT ANY EVIDENCE TO THE CONTRARY IN THE RECORD, THE HEARING JUDGE ERRONEOUSLY RELIED ON SPECULATION AND HEARSAY TO FIND FACTS IMPLICATING WYSHAK IN EGGLESTON'S SCHEMES IN THE PREPARATION OF DOCUMENTS AND NEGOTIATIONS WITH THE COMPLAINING WITNESSES.

Wyshak's testimony was that when each of the initial transactions regarding the Pennington, Mollan-Masters, and Freund properties was negotiated, he knew nothing about them, did not participate in them, and signed no documents. There was no evidence presented by the Office of Trial

Counsel to contradict Wyshak's testimony that he knew anything about the transactions until after they were negotiated and executed. In fact, not one of the complaining witnesses testified that they had any personal contact with Mr. Wyshak prior to or during the negotiations regarding their properties. Thus, Mr. Wyshak's testimony must be accepted as true. "Where an attorney's testimony is plausible and uncontradicted, it should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered." In the Matter of Cacioppo, supra 137. Furthermore, the hearing judge's rejection of Mr. Wyshak's testimony does **"not create affirmative evidence to the contrary** of that which is discarded." In the Matter of Anderson, (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 785. (Bold added). What the hearing judge did here was to rely on inadmissible hearsay testimony to support facts, when there was no direct admissible evidence to contradict the testimony of Mr. Wyshak. The Review Department made the same error.

XIV

THE HEARING JUDGE SHOULD HAVE DISMISSED COUNT 15, WHICH ALLEGED THAT WYSHAK FAILED TO REPORT THE IMPOSITION OF $80,000 IN SANCTIONS TO THE STATE BAR, WHEN THE CASE LAW REQUIRING HIM TO DO SO WAS NOT REPORTED UNTIL AFTER THE MISCONDUCT.

In the Matter of Y (Review Dept. 5/5/98, ____ Cal. State Bar Rptr. ____) requiring a member to report sanctions to the State Bar, whether or not they were pursuant to a final determination was not issued until after the trial of this matter.

Since the record is clear that the sanctions were reported to the State Bar by Wyshak, but perhaps not as soon as he should have, as he was prosecuting his appeals through the Appellate Department of the Superior Court and the Court of Appeal, Count 15 should be dismissed. He vigorously pursued the appellate process because he thought the sanctions were a "gross miscarriage of justice." (RT VII, 10-14). The final appeal was denied in June, 1997.

Even if this Court finds the Matter of Y applicable, failure to report sanctions is not a serious ethics' violation, as "Y" warranted only a private reproval.

XV

IT WAS AN ABUSE OF DISCRETION FOR THE REVIEW DEPARTMENT TO HAVE DENIED WYSHAK'S MOTION TO AUGMENT THE RECORD, ETC. WHILE THE REVIEW WAS UNDER SUBMISSION, TO PROVE EGGLESTON'S PROPENSITY FOR "IDENTITY THEFT".

Wyshak's Motion to Augment, etc. was filed on or about 5/26/99 with certified copies of the criminal proceedings against Eggleston for the "identify theft" of another George Eggleston, which culminated in the spring of 1999 with a three year prison sentence.

Without any reason or explanation, this motion was denied by the Review Department. There is no question but that this would have corroborated Wyshak's position that Eggleston took it upon himself to identify with Wyshak, using his name, reputation, and signature to make deals with strangers without Wyshak's knowledge or authority.

The Motion to Augment the Record, etc. should have n granted by the Review Department.

XVI

WYSHAK'S CHARACTER WITNESSES, COMMUNITY SERVICE AND UNBLEMISHED LEGAL CAREER SINCE 1948 SHOULD BE GIVEN SIGNIFICANT WEIGHT IN DETERMINING DISCIPLINE.

This Court should

> "**independently examine the record and weigh the evidence," it is "not bound by the review department's findings of fact or conclusions of law.** Petitioner bears the burden of demonstrating error in the review department's findings and conclusions. (Sands v. State Bar (1989) 49 Cal.3d 919, 928). The charges against an attorney must, however, be supported by convincing proof to a reasonable certainty. (Young v. State Bar (1990) 50 Cal.3d 1204, 1215-1216)." Kelly v. State Bar, 50 C.3d 509, 516-7 (1991). (Bold added).

In Colangelo v. State Bar, 53 C.3d 1255, 1265 (1991), this Court pointed out:

> This Court's "principal concerns in State Bar disciplinary proceedings are always the protection of the public, the preservation of confidence in the legal professions, and the maintenance of the highest professional standards for attorneys. (Young v. State Bar, (1990) 50 Cal.3d 1204, 1215)." Although the Court should "exercise... independent judgment in determining the discipline to the imposed on an attorney for disciplinary violations (Greenbaum v. State Bar (1987) 43 Cal.3d 543, 550), "it should "accord the findings and recommendations of the State Bar great weight in determining the appropriate disciplinary sanctions. (In re Basinger (1988) 45 Cal.3d 1348, 1358)."

As this Court said in Borré v. State Bar, 52 C.3d 1047, 1053 (1991):

> "The protection of the public and the bar not punishment, is the primary purpose of attorney discipline. We must

> accordingly consider all relevant mitigating and aggravating circumstances. (Coombs v. State Bar (1989) 49 Cal.3d 679, 693)."
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> * * * *
>
> "Lack of a prior disciplinary record over many years of practice may be considered in mitigation when coupled with present misconduct which is not deemed serious."

(A) MR. WYSHAK PRESENTED IMPRESSIVE CHARACTER WITNESS TESTIMONY.

The witnesses included prominent attorneys practicing in the community, two judges, and a clinical social worker. Each testified that he or she believed Mr. Wyshak's conduct was aberrational, the Mr. Wyshak was honest and of high integrity, and that Mr. Wyshak would never engage in dishonest conduct. All except for Judge Williams and Judge Kaddo were familiar with the general details of the misconduct, and had read the hearing judge's tentative findings. (Ex. JJ). Their testimony was as follows:

i. Judge James Kaddo

Judge Kaddo was admitted to the California Bar in 1964. He was appointed to Los Angeles Municipal Court bench in 1991. Prior to his appointment to the bench, he practiced general, civil and criminal law, as well as handling real estate transactional matters. (RT VIII, 2). Superior Court Judge Kaddo, along with Superior Court

Judge Williams, U.S. District Court Judge Rafeedie and Mr. Wyshak were founding members of the Arab-American Lawyers Association of Southern California. (RT VIII, 3). He has known Mr. Wyshak since the 1970s, and they became social friends as well as colleagues. (RT VIII, 3). Mr. Wyshak was "the dynamo and the moving force behind the Bar Association." (RT VIII, 4). Judge Kaddo did not want to review Judge Marcus' tentative findings of fact (Exhibit JJ) prior to his testifying. He believed that Mr. Wyshak has the "highest quality of character," and has never known him to be dishonest. Over the years, he has referred clients to Mr. Wyshak, and the reports he has received back are always that Mr. Wyshak did excellent work. Mr. Wyshak is highly respected in the legal community, and has a reputation of an honest and ethical lawyer. (RT VIII, 6). Judge Kaddo felt that Judge Marcus' findings were "out of character with the Bob Wyshak that I knew." (RT VIII, 11). And despite having been given more information about Judge Marcus' findings would still testify to Mr. Wyshak's good moral character. (RT VIII, 12).

ii. Judge Ernest Williams

Judge Williams was appointed to the Los Angeles Superior Court in 1985. He served one year in Pasadena in the criminal court, three years in juvenile, and has been in civil court for nine years. Prior to being appointed to the bench, he had a litigation practice since he was admitted to the Bar in 1954. (RT VIII, 16). Judge Williams has been involved with numerous judicial special events. (RT VIII, 17).

Judge Williams has known Mr. Wyshak since 1954 or 1955. over the years he has had both a social and professional relationship with Mr. Wyshak. Mr. Wyshak was one of the founding members and president of the Arab-

American Bar Association in which Judge Williams was also involved. (RT VIII, 18).

Judge Williams did not believe it was appropriate for him to read the Tentative Findings (Exhibit JJ) because he was testifying as to Mr. Wyshak's general character and reputation in the community. (RT VIII, 18-19).

Despite Judge Williams lack of familiarity with the charges against Mr. Wyshak, he believed that "Mr. Wyshak's reputation in the community for truth, honesty and integrity is above reproach, and I have never heard anything negative about him, and I don't know anything negative about him." (RT VIII, 19).

Judge William believed it would be out of character for Mr. Wyshak to defraud anyone. (RT VIII, 20).

iii. The Testimony of James George

James George was admitted to the practice of law in 1954. He has a general law practice. (RT VIII, 32).

Mr. George was familiar with Judge Marcus' Tentative Findings against Mr. Wyshak. (Exhibit JJ.), (RT VIII, 33). Nevertheless, he agreed to testify as a character witness. He stated, "I found him [Mr. Wyshak] to be meticulously ethical and exacting in his requirements on moral and ethical issues, and I have never seen him in 35 to 40 years to deviate from that standard in any of my relationships with him or anything I've heard about him, other than this document that was recently sent to me." (RT VIII, 34).

Mr. George has never known Mr. Wyshak to be dishonest or unethical, and concluded that his reputation is of the highest standing in the legal community. (RT VIII, 34).

iv. The Testimony of Bruce Hochman

Mr. Hochman was admitted to the Bar in 1952. After serving as a judge officer in the United States Air Force, and in the Tax Division of the U.S. Attorney's Office, he went into private practice, specializing in tax cases. He is currently a member of Hochman, Salkin & DeRoy. (RT VIII). He serves on various committees of the American Bar Association, California State Bar, Los Angeles County Bar, and has published a number of articles on tax law. (RT VIII, 46). He met Mr. Wyshak when they both served as Assistant U.S. Attorneys. (RT VIII, 47). Mr. Hochman has known Mr. Wyshak for over 44 years. Mr. Wyshak has never been dishonest or unethical. (RT VIII, page 48.) Mr. Hochman believed the judge's findings would be aberrational for Mr. Wyshak. (RT VIII, 49). Mr. Hochman believed that Mr. Wyshak has "learned his lesson from this experience" and poses no danger to the public. (RT VIII, 60).

v. The Testimony of Donna Bullock Carrera

Ms. Carrera is an attorney who was admitted to the Bar in 1983. She is currently a sole practitioner. Prior to that, she worked with a number of law firms, with the Equal Employment Opportunity Commission, and as a prosecutor in the Anaheim City Attorney's Office. (RT VIII, 67). She regularly volunteers as a judge pro tem in the City of Norwalk, does pro bono work through the Long Beach Legal Aid Foundation, and also handles pro bono cases through the National Organization for Women and the

Legal Aid Foundation. (RT VIII, 68).

She has been friends with Mr. Wyshak for three or four years. He has referred some cases to her. (RT VIII, 69).

Ms. Carrera is familiar with the judge's Tentative Findings, and reviewed Exhibit JJ. She believes Mr. Wyshak to be "a fine man, an honest man, a diligent attorney." (RT VIII, 71). Ms. Carrera does not believe that the conduct as set forth in the judge's tentative findings is consonant with Mr. Wyshak's character. (RT VIII, 72-73). Nor does she believe he poses any danger to the public or the legal profession.

vi. The Testimony of Dr. Verda Bradley

Dr. Verda Bradley is a clinical social worker who works for the Department of Health as a dual diagnosis coordinator. She specializes in working with people who have mental health and substance abuse problems. She also has a private practice. (RT VIII, 112). She has won various awards in Europe and the United States. She serves on the African-American Education Commission of the Los Angeles Unified School District, and is a professor at the University of Southern California. (RT VIII, 113-114). She has known Mr. Wyshak for approximately 10 years. She saw him in therapy for approximately seven months, and subsequent to the termination of therapy, became friends with him. She reviewed Exhibit JJ and is familiar with the judge's tentative findings. (RT VIII, 114-116).

Dr. Bradley believes that the findings are "totally out of character with Mr. Wyshak," stating, "I find that he is truthful and have not known him to lie." (RT VIII, 116). Mr. Wyshak "appears to me to be a person of

high integrity and honesty is high on his list. He is a person who generally tries to help others." She has never known Mr. Wyshak to do anything unethical.

vii. The Character Letters

Mr. Wyshak also presented five letters from attorneys, one of whom is his former wife, as evidence of his good character. Each of these witnesses believed that Mr. Wyshak was competent, diligent and ethical. Mr. Hanna believed that Mr. Wyshak's conduct was aberrational and inconsistent with his good character. (Exhibit KK.) (See also, Exhibits MM, NN, OO and PP.) The totality of this evidence constitutes an extraordinary demonstration of Mr. Wyshak's character.

This Court has long considered character witness testimony extremely important in State Bar proceedings. This is true even if the witnesses are not aware of the precise nature of an attorney's misconduct. For example, in In the Matter of Respondent E. (Rev. Dept. 1991) 1 Cal. State Bar Rptr. 716, 729, this court stated:

> "A great number of character witnesses, including two judges who have known respondent for a very long time, testified about his impeccable honesty and reliability. While the hearing judge points out that most of the character witnesses were unaware of the precise nature of respondent's misconduct, it is extremely unlikely that the extraordinary high opinion of respondent's

> honesty and trustworthiness expressed by the character witnesses would change much with knowledge of the details. Indeed, two witnesses were very knowledgeable of the facts and it had no effect on their opinion."

The Review Department has criticized hearing judges for not giving character testimony sufficient weight. In In the Matter of Hertz (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rprt. 456, 471, this court opined:

> "We modify the findings in mitigation to note that although respondent showed extremely poor judgment in this instance, he had several highly reputable character witnesses who attested to his otherwise high standing in the legal community and his ethical standards and demonstration of diligence on behalf of clients. Evidence of substantial community service and pro bono activities was also introduced. Although the referee considered these as mitigating factors, he apparently gave them little weight in recommending disbarment. We have concluded, however, that the mitigation produced below... is

entitled to more weight than recommended below."

In light of the overwhelming character witness testimony presented by Mr. Wyshak, it is clear the hearing judge did not give it sufficient weight, finding only that it was an "adequate" demonstration of Respondent's character." (Decision, 38).

(B) MR WYSHAK'S COMMUNITY SERVICE IS A SIGNIFICANT MITIGATING FACTOR.

The hearing judge made no mention of Mr. Wyshak's significant community service. However, almost all of the character witnesses testified that Mr. Wyshak was one of the founding members and president of the Arab-American Bar Association, (RT VIII, 18), and that he has participated actively in various Bar activities, as well as serving as a judge pro tem. Mr. Wyshak testified that he has been President of the West Hollywood Bar Association, President of the Westwood Village Bar Association and Chairman of the Tax Section of the State Bar of California. (RT VIII, 131-132). He has done extensive pro bono work, serving as legal counsel to a magazine called "News Circle" and the Foreign Press Guild. (RT VIII, page 132, lines 20 through 24). He has sat as a judge pro tem in the Beverly Hills and Los Angeles Superior Courts and has heard Small Claims appeals. (RT VIII, 132-133).

It is well established that community service deserves recognition as a mitigating circumstance under the standards. Porter v. State Bar 52 Cal.3d 518, 529 (199); In the Matter of Respondent K. (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.

(C) MR. WYSHAK'S UNBLEMISHED LEGAL CAREER SINCE 1948 SHOULD BE GIVEN SIGNIFICANT WEIGHT

The hearing judge gave Mr. Wyshak's unblemished record of practice since 1948 very little weight because of the "seriousness of the misconduct." However, an attorney's long unblemished record carries significant weight, even in serious cases. For example, in In the Matter of Lilly (Rev. Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, respondent commingled trust funds and misappropriated $20,000.00 in trust funds that were to be used as a deposit on a least for a joint venture involving the sale of exotic automobiles. He also misrepresented to a third party that the funds were in a trust account. The former client was required to hire an attorney to obtain return of the funds. As an aggravating factor, respondent made restitution to the former client by using money from a probate estate wherein he was the executor, funds he had no right to use without prior court approval.

The hearing judge recommended disbarment. In reversing the lower court decision and recommending suspension, the Review Department accorded significant weight to the attorney's lack of a prior record of discipline over 21 years of practice. The court stated:

> "...without diminishing the gravity of respondent's misconduct, we believe that the combination of his 21 year record of practice without prior discipline, coupled with the relatively narrow time frame over which his misconduct occurred, are

factors which have been weighed more heavily in similar cases by our Supreme Court than by the hearing judge. In Friedman v. State Bar (1990) 50 Cal.3d 235, 245, the Supreme Court was faced with very serious misconduct by a practitioner in two client matters with more than 20 years of blemish-free practice. While Friedman presented some additional mitigating evidence which respondent did not, Friedman's misconduct lasted longer than respondent's and included perjured testimony and an attempt to manufacture evidence at the hearing. In rejecting the disbarment recommendation of the former, volunteer review department and instead ordering a five-year stayed, three-year actual suspension, the Supreme Court described Friedman's unblemished record as 'highly significant for purposes here' and considering evidence of family problems causing stress, the Court concluded that Friedman's behavior could be termed 'aberrational.'" Id. at 192.

In Friedman v. State Bar, supra, the Supreme Court held:

> "Although petitioner's misconduct was serious, it appears to have been aberrational. It was attributable at least in part to stresses petitioner experienced arising from marital problems. More important, it occurred after he had practiced law for more than 20 years with an unblemished record. That fact is highly significant for purposes here. 'The absence of prior disciplinary record is in itself an important mitigating circumstance.'
>
> (Citations omitted.)
>
> 'It is [a] particularly... strong mitigating factor in this case, given petitioner's substantial years of practice.' (Citations omitted.) Accordingly, in view of the prophylactic purpose of attorney discipline, disbarment would be excessive in this case."

Mr. Wyshak testified that he went through a difficult period in the early 1990's after he divorced his wife Lillian, and they decided to dissolve their practice. Mr. Wyshak became depressed, tense and frustrated. In addition, he

suffered a number of medical problems including a hernia and severe asthma. (RT VIII, 135-136). He started taking Prozac, an anti-depressant for his depression. However, at the time of the proceedings, he was still feeling quite depressed. (RT VIII, 136). The first time Mr. Wyshak had any idea Eggleston was making improper use of his name was when he received an inquiry on behalf of William Pennington sometime in April 1992. (RT VIII, 145).

If Mr. Wyshak had it to do over again, he would have contacted Mr. Pennington, Ms. Mollan-Masters, and the Freunds and advised them that he knew nothing about their real estate deals and would not have agreed to act as custodian trustee. (RT VIII, 146-147). He had no personal knowledge of any of the dealings with the Zwiebels until the motion hearings in the unlawful detainer matter. (RT VIII, 147-148). His testimony was uncontroverted that the Eggleston Cortrust proposal of January 21, 1992, that Dr. Zwiebel would refinance his property and the proceeds would be given to Mr. Wyshak as custodial trustee expired by its own terms on March 15, 1992, and became a nullity. (RT VI 120, Exhibit 134). Wyshak was not involved in anything Eggleston negotiated with the Zwiebels. He had no knowledge or involvement in obtaining the powers of attorney which allowed the properties to be refinanced. (RT VI, 120-121) (Ex. 110). Furthermore, he had nothing to do with the refinancing. My Wyshak met the Zwiebels only once in January 1992, when he went to look at their Monrovia house because they wanted to lease it. He never spoke to them again until he met them in the Pasadena Municipal Court in connection with the unlawful detainer action in August 1992. (RT V, 104-105). Mr. Wyshak believed Eggleston was "interesting, very bright, very intelligent. He knew more about taxes than any non-professional I've ever met in my life." (RT VIII, 148). When Eggleston volunteered to talk to the FBI after the

Senate hearing in 1991, it confirmed Mr. Wyshak's opinion of his integrity. Furthermore, he believed that Mr. Eggleston had found religion and had become a moral and ethical person. (RT VIII, 149). Unfortunately, his judgment about Eggleston was very wrong. Mr. Wyshak never benefitted in any way or received anything of value from these transactions, aside from escrow fees.

CONCLUSION

No one would argue Mr. Wyshak's misconduct was not serious. He hid his head in the sand rather than confronting Eggleston with his schemes and turning him over to the proper authorities. However, the surrounding facts and circumstances demonstrate that Mr. Wyshak's misconduct was aberrational. It occurred after Mr. Wyshak had practiced law for more than 43 years with an unblemished record. The misconduct occurred during the time Mr. Wyshak was under significant financial and emotional stress from his divorce, the dissolution of his law firm, and the attendant financial distress. He was depressed and not thinking clearly. He did not have the funds to hire a lawyer.

It is undisputed that Mr. Wyshak was never a party to any of the negotiations regarding the property sales, and most, if not all, of the documents which were purportedly signed by him were created, signed and transmitted by Eggleston without Mr. Wyshak's knowledge or consent. Mr. Wyshak was never retained or paid by any of the property owners, and thus, did not owe them the same duties he would owe to a client. As the hearing judge found, there was **no evidence of an attorney-client relationship between Mr. Wyshak and any of the parties.** (Decision, page 6, lines 16 through 25, page 12,

lines 5 through 11, page 14, lines 6 through 9; page 31, lines 24 through 25, page 32, lines 1 through 4.)

The hearing judge made numerous evidentiary errors which resulted in Mr. Wyshak being denied due process and the constitutional right of confrontation of witnesses. cf. Lilly v. Virginia, _____ US _____, 144 L.Ed.2d 117 (1999). In addition to allowing evidence of a conspiracy and numerous other errors discussed herein, he mistakenly allowed in hearsay exhibits, finding that they "self authenticated." (See, for example, RT VII, 31-33.) He also misconstrued the evidence. For example at Decision 29, lines 14 through 21, the hearing judge finds Mr. Wyshak was held in contempt in the Freund matter. There was no evidence to support that finding. Mr. Wyshak was never held in contempt. Exhibit 60, on which the hearing judge relied for his finding, was never offered, identified or received into evidence!

Many of OTC's exhibits and much of their witnesses' testimony were admitted pursuant to Evidence Code Section 1223 in error. Without those exhibits, there is little, if any, evidence left to support the hearing judge's findings of culpability.

Numerous character witnesses testified as to Mr. Wyshak's honesty and good moral character. He has continued to participate in community activities and assist others to the extent he is able. Because Mr. Wyshak's misconduct was clearly aberrational, the threat of future misconduct is extremely slim. Thus, disbarment would be excessive in this case, given Mr. Wyshak's age.

The hearing judge's Order of February 27, 1998 involuntarily enrolled Mr. Wyshak as an inactive member of the State Bar. He did not practice law and was suspended

until a year and a half later, when the Review Department's Opinion ruled that this was error, since B&P §6007(c)(4) as amended January 1, 1997 was not effective for Notices filed prior to that date.

It is submitted that this year and a half's suspension is appropriate discipline for Mr. Wyshak's behavior in this matter.

Respectfully submitted,

/s/
R. H. Wyshak

VERIFICATION

I, Robert H. Wyshak, am the petitioner. I have read the foregoing Petition and know of my own knowledge that its contents are true.

I declare that I executed this under the penalty of perjury on February 3, 2000 at Beverly Hills, California.

/s/
R. H. Wyshak

PROOF OF SERVICE

I certify that I served the within Petition by mailing 3 copies to the Office of General Counsel, State Bar, 180 Howard Street, San Francisco, California 94105 and one copy to the State Bar Court, 1149 S. Hill Street, 5th floor, Los Angeles, CA 90015, on February ____, 2000 together with the Appendix at Beverly Hills, California.

/s/

Appendix 3

PUBLIC MATTER
FILED
FEB 27 1998

THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	) CASE NO. 92-0-20339-MDM
	)
ROBERT H. WYSHAK	) DECISION
Bar No. 20132,	)
	)
A Member of the State Bar.	)
	)

I. INTRODUCTION

After having been a lawyer for forty-three years, Robert H. Wyshak (Respondent) became involved in a series of schemes to defraud unsuspecting people of their property, which schemes included, in at least one instance, defending the fraud in the courtroom by lies and false evidence after two of the victims sought legal redress.[1/] For these reprehensible acts, it is recommended that Respondent be disbarred from the practice of law.

[1/] At the time of the hearing, Respondent had been practicing law for approximately forty-nine years.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Mollan-Masters Transaction; Counts Fifteen, Sixteen and Seventeen

Renee Mollan-Masters was looking in a down real estate market in 1991 for a buyer for her father's property in the Palm Valley Country Club in Palm Desert, California. In April of that year, a real estate agent told her about an offer from the Centurion Trust to buy the property for $220,000. (OCTC exhibit 33.) When negotiations began, Mollan-Masters was told by one George Eggleston that the sale proceeds would be placed in an irrevocable trust with Respondent as the escrow holder and trustee. She had been advised by her parents' trust attorney that Respondent was a harvard law school graduate, a former judge pro tem and a former assistant United States tax attorney.

Mollan-Masters did not know that Eggleston was a convicted felon and had been a financial adviser to and a client of Respondent's. Although a subsequent and lengthy trust agreement in the matter contained an ambiguous reference to Respondent's having served "as Trustee for one or more of the parties hereto in other transactions" (OCTC exhibit 34, p. 22), there was no evidence Respondent ever told Mollan-Masters who these parties were or what the transactions were about.

Respondent prepared escrow instructions for the sale of the Mollan-Masters property which provided that the buyer would deposit a cash grant into an irrevocable trust. (OCTC exhibit 34, p. 19.) Upon completion of the sale, Respondent sent Mollan-Masters on June 26, 1992 a $25,000 check, a copy of the executed irrevocable trust agreement and a settlement statement. (See OCTC exhibit 84 for a

copy of the check.) The settlement statement represented that the cash grant was for $218,853. (OCTC exhibit 35, pages 2 and 10.) Respondent signed the trust agreement, which acknowledged receipt of the cash grant, on behalf of the law offices of Robert H. Wyshak and Associates. (OCTC exhibit 35, p. 9.)[2/]

After the transaction was completed, Mollan-Masters became concerned about certain of its terms and called Respondent to express her uneasiness. She told him she had not seen any evidence that actual funds had been deposited into the trust following the transfer of the property. (See OCTC exhibit 37, Mollan-Masters' written communication to Respondent on this subject.) In response, Respondent said the agreement did not require notarization and that recordation was not required under California law. (OCTC exhibit 36.) He did not discuss the absence of any deposited funds although he had previously told Mollan-Masters that the trust had been funded. (OCTC exhibit 45.)

According to the terms of the sale, $72,951 was to be paid to Mollan-Masters on or before June 24, 1993. In April 1993, she demanded this payment from Respondent. (OCTC exhibit 42.) Respondent did not answer her letter. She then made repeated calls to Respondent, including leaving a nasty message on his answering machine. Eventually, Respondent told Mollan-Masters he had not received her letter requesting payment. She faxed a copy of the letter to Respondent and sent another notice to him by registered mail, which he received. Regardless, he still did not respond to her demand. Mollan-Masters wrote yet

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[2/] Although the prospective buyer of the property was the Centurion Trust (OCTC exhibit 34), the settlement document refers only to an Orion Trust. (OCTC exhibit 35.) There was no explanation for this change of names or entities.

another letter to Respondent on July 15, 1993 (OCTC exhibit 43) which he still did not answer. She sent a third registered letter to Respondent, return receipt requested, which was returned after two unsuccessful attempts at delivery. (OCTC exhibit 47.)

Mollan-Masters did not talk to Respondent until November 1993 when she surprised him at his office. He told her that he, too, had been duped and could not get the money from the trustee. He did not explain how he had been victimized. However, he was willing to sue the trustee if Mollan-Masters would pay him $2,000 for his services. Shortly thereafter, Respondent told Mollan-Masters he wanted $6,000 to handle her case. In the interim, Mollan-Masters asked Respondent to consider foregoing any retainer. (OCTC exhibit 45.) He did not respond to her suggestion. Instead, on February 8, 1994, Respondent demanded a non-refundable retainer of $10,000. (OCTC exhibit 46.)[3/] In that same letter, he identified Ronald Morgenstern, Daniel Kempka, Jeffrey Dachman and Rebecca Fedorow as the parties responsible for failing to deposit the money into the trust. No reference was made to Eggleston. Mollan-Masters, her parents' former condominium was now in a foreclosure sale with encumbrances almost equal to the value of the property.

In actuality, the Oxford Trust, rather than the Centurion or Orion Trusts, had bought the Mollan-Masters' property. (OCTC exhibit 166.) Thereafter, ownership of the property became even more tortured. On August 24, 1992 (a little more than two months after Mollan-Masters' grant deed to Oxford), Oxford transferred the property to Morgenstern and Kempka who immediately quitclaimed it to

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[3/] Although the actual date on Respondent's letter is February 8, 1993, the sequence of events suggest this was a typographical error.

Montreux Ltd., one of Eggleston's alter egos. Kempka testified he had received the property from Eggleston and did not know the previous owner had been Mollan-Masters. Montreux, ten months later, granted the property to Eggleston. On that same date, Eggleston supposedly transferred the property to William Pennington. (OCTC exhibit 166.) Pennington's lawyer testified that Pennington did not own the property. Instead, it was the DeMonds, Eggleston's in-laws, who were occupying the former Mollan-Masters' condominium.

The falsity of the purported Eggleston - Pennington transaction and Respondent's participation in the entire charade is further confirmed by Respondent's subsequent defense of Montreax in an unlawful detainer action by the Palm Valley Homeowners Association regarding the condominium. In September 1994, fifteen months after Eggleston had supposedly deeded the property to Pennington, Respondent moved on behalf of Moutreux to quash service of the unlawful detainer action because of procedural defects and lack of jurisdiction. (OCTC exhibit 179.) Had Eggleston or his in-laws not been living in the property, a simple letter to the plaintiffs explaining the facts would have sufficed. Respondent's blunderbuss response suggests, instead, a delaying action on behalf of Eggleston, the property's tenant.

B. Findings of Law Regarding the Mollan-Masters Matter

1. Count Sixteen; Bus. and Prof. Code section 6106

This count alleges, in substance, that Respondent was to serve as an independent escrow holder in the sale of the Mollan-Masters property; that, as trustee, he was to receive

$218,583 from the buyer of the property; that he represented in an irrevocable trust agreement that he had received the sum and further represented to Mollan-Masters in a settlement statement that he had received this amount and was holding it in trust but, in fact, did not receive and have in trust the $218,583 on or about June 24, 1992.

The evidence clearly shows that Respondent represented to Mollan-Masters he had received a $218,853 cash grant from the sellers, was holding it in trust for her and did not, in fact, have these funds.[4/] Respondent, therefore, is culpable of an act of moral turpitude for having misrepresented to Mollan-Masters, to whom he owed a fiduciary duty, the existence of the cash grant. (Gold v. State Bar (1989) 49 Cal.3d 908, 914, attorney who deceives client is culpable of moral turpitude; Simons v. State Bar (1969) 70 Cal.2d 361, 365-366, attorney owed fiduciary duty to non-client where he acted as a real estate broker and had accepted money in trust.)

2. Count Seventeen, Bus. and Prof. Code section 6068(m)

This count alleges that Respondent failed to respond to Mollan-Master's request that he provide her with proof that the trust had been funded.

On several occasions, Mollan-Masters attempted unsuccessfully to have Respondent prove the existence of the funds. However, she was not Respondent's client, and there was no showing the reasonably believed Respondent to be

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[4/] The variance in the amount alleged ($218,583) from the amount proved ($218,853) is insubstantial and did not mislead Respondent or deprive him of an opportunity to present a defense. (Read v. State Bar (1991) 53 Cal.3d 394, 408.)

her attorney. (Butler v. State Bar (1986) 42 Cal.3d 323, 329, duty to communicate includes persons who reasonably believe they are clients of the attorney to at least advise they are not clients.) Nor was there evidence that Mollan-Masters had sought legal advice from Respondent and thereby had established an attorney-client relationship. (Beery v. State Bar (1987) 43 Cal.3d 802, 811 citing Perkins v. West Coast Lumber Co. (1900) 129 Cal. 427, 429.) Consequently, this count is dismissed with prejudice because the statute does not cover the facts alleged.

3. Count Eighteen; Rule of Prof. Conduct 4-100(B)(3)

It is alleged in this count that Respondent failed to render an accounting to Mollan-Masters.

Mollan-Masters demanded from Respondent an explanation for the existence of the cash grant and payment of the sale proceeds. Although she did not use the term "accounting" in these several requests, there is no doubt that that word is incorporated in the information which she sought. The critical issue again is whether Respondent owed a duty to account to Mollan-Masters, who was not a client by any express agreement. The situation is somewhat analogous to the facts in Hartford v. State Bar (1990) 50 Cal.3d 1139 wherein non-client Knapton pledged stock as security to Hartford so that he would continue to represent Harris and Crist in their breach of contract lawsuit. The Supreme Court found that Rule of Professional Conduct 8-101(B), the predecessor to rule 4-100(B), did not apply because it refers only to clients. (At pp. 1152-1153.) Therefore, count eighteen is dismissed with prejudice for a failure of proof.

C. The Pennington Matter; Counts One Through Six

In 1991, William Pennington sold a residence and an adjoining, vacant lot in the Indian Wells Country Club in Indian Wells, California to the Centurion Trust for cash and a $1,440,000 secured promissory note. Payments of the note were to come from bond instruments. (Respondent's exhibit D, an April 13, 1992 letter from Respondent to attorneys for Pennington.) Respondent was to be the escrow and would hold approximately $1,400,000 to $1,700,000 of securities in case of a default. According to Respondent, income from Ginnie Mae and Hong Kong bonds were to pay the indebtedness on the promissory note.

Richard Glasson, Pennington's lawyer, became involved in the transaction after it was too late to stop it.[5/] He could never get Respondent to say whether or not Respondent was holding the bonds. Respondent testified that after Glasson started making inquiries about the Pennington Trust, Respondent called Eggleston who told Respondent about the deal Eggleston had made with Pennington. Respondent said he then received paper work from Eggleston concerning the Pennington transaction including a letter (Respondent's exhibit D) upon which he contends Eggleston had signed Respondent's name. Respondent also claims he asked Eggleston what right he had to sign his name to the letter. Respondent testified that Eggleston had also signed

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[5/] Neither the documents evidencing the transaction, Pennington's and Respondent's depositions in the resulting litigation nor the records of the underlying civil litigation itself were introduced at the trial herein. The findings of fact as to the Pennington allegations are gleaned from Richard Glasson's limited knowledge of the facts, Respondent's self serving testimony and his correspondence to both Glasson's law firm and the State Bar (respectively, Respondent's exhibit D and OCTC exhibit 172).

Respondent's name to a custodian document in the transaction.

Respondent asserted that before 1992, Eggleston had forged Respondent's name to other documents but that he only learned of these forgeries when Eggleston did it again in the Pennington matter. Respondent did not terminate their relationship because, in his opinion, the Pennington transaction was not illegal and Eggleston had promised he would not forge Respondent's name again. Respondent further said he did not report Eggleston to law enforcement for signing his name without authority because he did not know what Eggleston could be charged with and to whom to report that misconduct.

Respondent also testified that Eggleston said that the securities for the Pennington property were in a Goldman Sach's account. (Respondent's exhibit C.) Respondent testified that he satisfied himself that these were ten percent bonds which would generate $150,000 a year. In actuality, Respondent told Rebecca Fedorow, a paralegal who had worked for Eggleston, there were no such bonds and was nervous about that fact because the Honorable Spencer Letts, who was presiding over the resulting federal litigation, was asking about the existence of the bonds.

On May 12, 1992, Glasson filed a multi-count complaint in the United States Court for the Central District of California against, inter alia, the Centurion Trust, Eggleston, Gorton DeMond and Respondent. (OCTC exhibit 12.) Glasson filed a second amended complaint against these same parties on October 2, 1992. (OCTC exhibit 13 and Respondent's exhibit L, the docket sheet in the matter.) In this lawsuit, Respondent represented himself as well as defendants Eggleston, Suzanne Moore (Eggleston's wife), Gorton DeMond and Rhodes, Bartlett, Winston and Simon.

Respondent's deposition was taken in the matter on September 22, 1992.[6] Respondent admittedly lied on several occasion during this deposition. He was untruthful when he said that Eggleston was his paralegal and that he, Respondent, was a representative of the Centurion Trust and Gorton DeMond. He testified Eggleston told him to say these lies. Respondent also said he lied because he was under stress, was not thinking clearly, was "freaking out" at the time of the deposition and could not afford to hire a lawyer to represent him.

As noted previously, Judge Spencer Letts presided over Pennington Trust v. Centurion Trust, et. al., CV 92-2875. Letts found the transaction sued upon difficult to understand because ordinarily a seller retains a security interest in the property sold, including the value of the home equal to the amount paid, whereas in the Pennington matter, there did not appear on the face of the documents that Pennington had such an interest. Instead, the security appeared to be limited to the interest to be paid. Letts testified that Pennington had not understood this condition and had not been represented by counsel although Letts opined that even knowledgeable counsel might have missed this issue. It was his understanding Respondent was to hold the security in the form of bonds.[7]

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[6] As noted previously, this deposition was not moved into evidence by OCTC.

[7] Much of what Letts found disturbing about the Pennington matter and Respondent's conduct was contained in his lengthy March 22, 1993 letter to the State Bard (OCTC exhibit 67) which was not received in evidence.

Letts entered a default judgment for $1,400,000 in Pennington against Respondent. His recollection is he may have struck the defenses based upon Respondent's unwillingness to comply with discovery. Respondent filed motions to set aside the default, to amend the judgment, for a new trial and to recuse Letts. (Respondent's exhibits E, F, G and H, all of which were received to show Respondent's state of mind rather than for the truth of the matter asserted therein.) Federal District Court Judge Mariana Pfaelzer denied the motion to recuse Letts. Letts has not ruled on the remaining motions.

In response to a February 5, 1993 letter from the State Bar requesting Respondent's explanations to Pennington's complaint that Respondent was not an independent escrow because he had been employed by one of the buyers and was the buyer's attorney and had also failed to provide Pennington with records and an accounting of his activities with respect to the collateral (OCTC exhibit 171), Respondent replied, in part, that Pennington was aware that Respondent represented certain parties connected with the buyer, that he never refused to provide Pennington with any information to which he was entitled and was neither scheduled to receive nor did receive the trust distributions. (OCTC exhibit 172.) In that letter, Respondent also claimed Pennington never had title to the property in question and, "in a cleverly conceived series of machinations to defraud our clients as buyer, managed to deliver only an assignment of a lease for the subject property." (OCTC exhibit 172, p. 2.)

D. Findings of Law in the Pennington Matter

1. Count One; Rule of Prof. Conduct 3-310(B)(1)

This count alleges that Respondent, who was employed by both William N. Pennington and the Centurion Trust, the seller and buyer respectively, to serve as an independent escrow holder in the sale of real estate by Pennington, did not disclose to Pennington or obtain his informed written consent to Respondent's employment of George Eggleston[8/] as a paralegal and director of financial services for Respondent and Respondent's law fir which, at the time, was employed as the director of trust and financial services for Cortrust Asset Management, Centurion's Financial Adviser.

This count has not been established by clear and convincing evidence. Whereas there is no doubt that a conflict existed because of the relationship between Respondent and Eggleston, no evidence of Respondent's alleged representations nor of his attorney-client relationship with Pennington were presented. Further, Pennington's deposition testimony, which might have shown an absence of any informed written consent, was not introduced.[9/] Respondent's incredible testimony is not enough. Therefore, count one is dismissed with prejudice.

[8/] The NDC misspells Eggleston's name as Eggleson.

[9/] Although the Court found Pennington to be unavailable and his deposition testimony admissible pursuant to Evidence Code sections 240 and 1291, OCTC chose not to use Pennington's testimony in the underlying civil litigation.

2. Count Two; Rule of Prof. Conduct 3-310(B)(1)

This count alleges that Respondent, who was involved as an independent escrow holder in the Pennington-Centurion Trust matter, was at the same time an attorney for Eggleston, Centurion, Suzanne Moore (Eggleston's wife), Gorton DeMond (Eggleston's father-in-law) and Fitzgerald, Jamieson, MacCloud & Duret, Ltd., the trustee for Centurion and, further, that he did not disclose to Pennington or obtain his informed written consent to this representation.

The same problem of proof occurs in this count as in count one because of the absence of both Pennington's testimony and the underlying transactional paperwork and the absence of proof of an attorney-client relationship between Respondent and Pennington. As a result, this count, too, is dismissed with prejudice.

3. Count Three; Bus. and Prof. Code section 6106

This court alleges that Respondent misrepresented to Pennington that he, Respondent, had possession of and was safekeeping a secured promissory note in the amount of $1,440,000, a security agreement for this note, the assignment of the securities in the interest and certain government bond instruments on behalf of Pennington when, in fact, Respondent had never obtained possession of the assignment of securities and has never ascertained whether the assignment existed.

The key question here is whether there is clear and convincing evidence that Respondent misrepresented to Pennington his possession of the promissory note and other

material documents in the sale of the Indian Wells property. Respondent's April 13, 1992 letter to Pennington's lawyers (Respondent's exhibit D), which this Court finds was written either by Respondent or by Eggleston, with Respondent's approval, does not indicate that Respondent was in possession of the note or documents.

The fact that Glasson recounted the nature of the transaction, which included that Respondent, as a trustee, was to hold Ginnie Mae and Hong Kong bonds which would pay for the indebtedness, does not establish the misrepresentations. He could have gleaned these facts from other persons or writings. Therefore, because Glasson did not testify to any representations made to him by Respondent, and there is no evidence of other statements by Respondent to Glasson (Pennington's agent), this count has not been established by clear and convincing evidence and is dismissed with prejudice.

4. Count Four; Rule of Prof. Conduct 3-310(B)(1)

This count alleges that Respondent failed to disclose to Pennington or obtain his informed written consent to the actual or reasonably foreseeable adverse consequences created by Respondent's business, financial or professional relationship with Eggleston.

Like count one, this count requires evidence that Pennington was Respondent's client. Because there is no evidence of this relationship, there is a failure of proof and count four is dismissed with prejudice.

5. Count Five; Bus. and Prof. Code section 6068(m)

It is alleged herein that Pennington made "numerous requests" to Respondent concerning the status of and an accounting for the collateral securing the promissory note and that Respondent failed to respond to these inquiries.

Glasson, as Pennington's representative, attempted to have Respondent recount what had happened to the bonds. It is uncontradicted that Respondent, besides saying he never had any bonds, was less than helpful. he did not return Glasson's telephone calls, did not produce any documents at his deposition, failed to obey court orders regarding discovery and refused to name the attorney to whom he had allegedly sent the files. However, since Pennington was not a client, Respondent had no duty to discuss relevant matters with Glasson and count five is dismissed with prejudice for an absence of proof.

6. Count Six; Bus. and Prof. Code section 6103

This count alleges that Respondent, in the Pennington lawsuit against Centurion, et. al., despite being ordered to answer specified deposition questions, to produce specified documents and to provide responses to specified interrogatories on one occasion and, on a second occasion, to respond to specified requests for production of documents, did not do so and, therefore, failed to comply with court orders.

There is credible evidence from both Judge Letts and Glasson that Respondent's default was entered in the Pennington lawsuit because he had failed to comply with the Judge's discovery orders. Respondent's only explanation for not producing documents in the matter was that he was

concerned about a possible criminal prosecution. He claimed he had answered interrogatories.

Respondent's assertion that he had complied with court orders is inconsistent with his own testimony and that of the other witnesses. This count has been established by clear and convincing evidence.

E. The Zwiebel Transaction; Counts Seven through Fifteen

Dirk Zwiebel, a sixty-five year old man who has been a clinical psychologist for thirty-five years and has a master's degree in theology, and Alberta Zwiebel were two more victims of Eggleston and Respondent. Dirk Zwiebel (Dr. Zwiebel) and his wife (Mrs. Zwiebel) were interested in leasing their home at 318 Terrace View Drive in Monrovia, California. Respondent, who looked at the property, told Dr. Zwiebel that he was a former federal judge, had gone to the same church as the Zwiebels and had law offices in Beverly Hills, Palm Springs and Washington, D.C.[10/] Respondent convinced the Zwiebels that he was a man of integrity.

Subsequently, a Linda Tracy expressed an interest in leasing the Zwiebel's house. She said she was a representative of the DeMond Group, an investment team made up of Eggleston, Respondent and Gorton DeMond. In

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[10/] A photograph of Respondent wearing a judicial robe and sitting behind a courtroom bench was introduced at trial. (OCTC exhibit 99.) Respondent said he gave Dr. Zwiebel the picture in April 1993 at Zwiebel's deposition after the Zwiebel's attorney had repeatedly told the presiding Judge about Respondent's misrepresentations. Respondent said the picture showed him hearing small claims appeal in 1993.

turn, Tracy introduced Dr. Zwiebel to Eggleston. Eggleston told Dr. Zwiebel that he, Respondent and DeMond were prominent people who would lease the Zwiebels' house. He did not mention that DeMond was his father-in-law. Eggleston suggested that the Monrovia property be refinanced with Respondent acting as a trustee for the funds received.

Later on, a house which the Zwiebels owned free and clear at 1035 South Arroyo Boulevard in Pasadena, which they were attempting to sell for $895,000, became involved in the discussions. Eggleston said that it, too, could be refinanced, with Respondent again acting as a trustee over the proceeds.

Dr. Zwiebel discussed final arrangements of the Monrovia lease with Eggleston in Palm Springs. Also present at that time were Respondent, Linda Tracy, Connie McMillian, Gorton DeMond, Mrs. Eggleston and two or three children. The refinancing of the Monrovia property was to be completed while the Zwiebels traveled to Israel.

Before leaving, the Zwiebels signed a document giving limited power of attorney to Gorton DeMond. Dr. Zwiebel had been told by Respondent, whom he believed to be honorable, that it was safe to give DeMond this authority. Respondent said that DeMond was honest as the day was long and would give the money to Respondent who, in turn, would put it in the bank. The Zwiebels signed the power of attorney on February 28, 1992 which was intended only to provide DeMond the authority to give funds to Respondent. (OCTC exhibit 149.) When Mrs. Zwiebel signed this document on the second and fourth pages, the address on the second page was not scratched out and the Pasadena property was not referenced.

Dr. Zwiebel also purportedly signed an agreement with Cortrust Asset Management concerning the Monrovia property. (OCTC exhibit 134.) The documented noted that this property had an appraised value of at least $1,215,000 with encumbrances not exceeding $270,000. It provided further that a minimum of $840,000 in financing was to be obtained on the property (page two), that the mortgage proceeds were to be used to pay off the existing mortgage(s), that $300,000 of the balance would be distributed to the Zwiebels with the remaining amount, not to be less than $260,000, to be given to Centurion as a loan in exchange for Centurion's executing a triple net lease agreement, that the loan would be secured by a promissory note (page three) and that the cash payments on the note would be secured by bonds which would be held in trust by Respondent's law office (page 4). Centurion was also given an exclusive option to purchase the property (page 5). Gorton DeMond signed the agreement on behalf of the Centurion Trust (page 10).

It is doubtful the Zwiebels ever saw this particular contractual agreement regarding the Monrovia property. (OCTC exhibit 134.) Their last name is misspelled throughout the document. Mrs. Zwiebel also testified that their family trust does not include the term "dated January 4, 1991" which appears at pages 11 and 17 of the agreement. And, whereas the power of attorney signed by Mrs. Zwiebel did not include their Pasadena property, this agreement indicates that attached to the document is the original power of attorney from the Zwiebels authorizing DeMond to execute any and all documents and instruments in connection with the financing and encumbrance of not only the Monrovia but also the Pasadena house. (OCTC exhibit 134, p. 24.)

Rebecca Fedorow, who worked as a paralegal for Eggleston between June 1992 and the summer of 1993, prepared documents in various lawsuits in which Eggleston was involved including the Zwiebel matters. In Respondent's presence, Eggleston told her he had gotten the Zwiebels to sign an power of attorney to refinance property and had forged another power of attorney to refinance the Zwiebel's other property. In Respondent's presence, Eggleston also told Fedorow he had created the trust documents and the trustees were whoever he wanted them to be. Eggleston said he had used a map of England to pick the trust names and that none of the trusts, including Cortrust, actually existed.

The Zwiebels found Linda Tracy living in the Pasadena house upon their return from the Holy Land. They had not given her permission to live there. The undated lease on the house had been executed by DeMond on behalf of the Zwiebels. (OCTC exhibit 148.)[11/]

The Zwiebels learned Tracy was claiming to be their daughter-in-law and had taken out insurance on both the Monrovia and Pasadena houses. The Zwiebels told Respondent to revoke all of the transactions because they were not what the Zwiebels had asked for or agreed to. Respondent did not act as requested. Eggleston told the Zwiebels if they sued him and Respondent, that they would grind the Zwiebels into the ground.

[11/] The lease terms were extremely favorable to Tracy. They included no rent for the first twelve months, $700 thereafter and an option to purchase the potential $895,000 property for only $650,000. This lease was presented by Respondent at the end of a subsequent unlawful detainer action brought by the Zwiebels against Tracy when the judge therein requested that Tracy show evidence of a lease after the Zwiebels had claimed there was no such arrangement.

In May 1992, Dr. Zwiebel asked Respondent what had happened to the refinancing funds. He did not receive an answer. Thereafter, he made phone calls on a daily basis to Respondent which were not returned. In attempting to track Respondent down, Dr. Zwiebel went to the several law office addresses listed on Respondent's letterhead. In Beverly Hills, he could not find an operating law firm. The Palm Springs address was only for a post office box. Likewise, he could find no office for Respondent in Washington, D.C. Respondent's explanation at trial was that his Beverly Hills office had become a mess in 1994 after the earthquake and that the Washington D.C. and Palm Springs offices were rentals in a Fegen-type suite.[12/]

The amounts of the loans on the Monrovia and Pasadena properties was not introduced at trial. The Zwiebels testified to two loans for $75,000 and $35,000 on the Monrovia property, but there was no indication whether Eggleston and Respondent obtained other funds on that house. Nevertheless, the interest on the loans was too high, and the Zwiebels were advised not to make the payments. Further, both the principal and interest were due and payable in one year. As a result, the Zwiebels lost both houses to foreclosure.

Coldwell Banker, at one time, had a listing to sell both the Monrovia and Pasadena properties. Apparently, Coldwell Banker demanded a share of the proceeds from the

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[12/] Pursuant to Evid. Code section 452(g), the Court takes judicial notice that in the 1970's attorney Paul Fegen popularized the concept of subleasing offices in a large suite to individual attorneys who shared a receptionist, conference rooms and a library.

refinancing of these two estates.[13/] Dr. Zwiebel told Respondent about the demand, who, in turn, said that he would like to represent Dr. Zwiebel regarding this issue. Respondent then wrote a letter to Coldwell Banker on February 26, 1992 concerning the situation. (OCTC exhibit 28.)

The Zwiebels filed an unlawful detainer lawsuit against Linda Tracy on July 21, 1992. Respondent, who represented Tracy, filed a demurrer to the lawsuit which was sustained. Emanuel Barling, Jr., substituted into the action on behalf of the Zwiebels, dismissed it and field a fraud action on September 20, 1992 on their behalf against Tracy, Respondent, Eggleston and others. (OCTC exhibit 19.) He then filed an unlawful detainer action on September 30, 1992 against Tracy and the Tracy Trust seeking to evict her from the Pasadena property. (See OCTC exhibit 32 for the five page history of that proceeding.)

In the two Zwiebel lawsuits, Respondent conspired with the other named defendants to create lies about Dr. Zwiebel. Eggleston told Respondent and others that a sexual harassment case against Dr. Zwiebel would delay the Zwiebels' lawsuits and force them to give up. Respondent did not object to the idea. (OCTC exhibit 112.) Pursuant to the plan, Respondent filed in the unlawful detainer action an opposition to the Zwiebels' motion for summary judgment, which opposition contained declarations of Linda Tracy and Connie McMillian that had been scripted by Eggleston. These statements contained allegations of verbal and physical harassment by Dr. Zwiebel toward Tracy. (OCTC exhibit 110, p. 18, lines 14-16 and 23-26; p. 19 lines 21-24; p. 38, lines 12-19; p. 19, lines 18-15 and p. 40,

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[13/] The specifics about these listings as well as the demands were not introduced.

lines 14-16 and 23-26.) Tracy and McMillian signed their respective declarations without reading them. Respondent also petitioned for an injunction prohibiting Dr. Zwiebel's alleged harassment of Tracy on the same fraudulent facts.

In November 1992, McMillian told Eggleston, Respondent and others she would not longer lie that Dr. Zwiebel had sexually assaulted Tracy. Tracy also said she had not been bribed or assaulted by Dr. Zwiebel and did not want to lie. Eggleston told these women and the remaining group that the declarations had already been sent to opposing counsel.

Dr. Zwiebel was an extremely credible witness. His answers on both direct and cross-examination were responsive and to the point. He had no discernable motive to testify falsely. An undiagnosed spot on his brain, which was found in 1993, did not impair his memory. Dr. Zwiebel did not feel well at the trial only because he had lost most of his retirement to Respondent and his cohorts.

Respondent, on the other hand, was an extremely unbelievable witness. He admitted to having lied about several matters at his deposition in the Pennington litigation. Further, he testified that he never had employed or had a business relationship with Eggleston notwithstanding abundant evidence to the contrary. (See, for example, Eggleston's statement, in Respondent's presence, before a United States Senate Committee in October 1991 that "I have been associated with the Wyshak law firm for a number of years working in the capacity of Director of Trust Services and as a paralegal." (OCTC exhibit 181, pages 54-55.) Respondent had also worked as tax counsel for Eggleston in 1982 concerning an alcohol fuel venture. In a third instance, Eggleston introduced Respondent to Utah business people as a lawyer who would do the legal work on a transaction in

which Eggleston had an interest concerning collateral to be given a bonding company.

He also said Eggleston had signed his name without permission to documents in the Mollan-Masters, Freund and Pennington matters, but provided totally implausible reasons for not thereafter disassociating himself from Eggleston. His explanations included that he could find nothing wrong with the documents, he could not afford an attorney, he did not know to whom to report the wrongs, Eggleston was not a danger because Eggleston had found religion and he was a pawn in Eggleston's hands.

On the point of the forgeries, it should be noted that Respondent never attempted to disavow them until the instant hearing. Obviously, a word to the unsuspecting victims would have been appropriate.

He testified Eggleston told him that he, Eggleston, would take care of Respondent and would undo the problems he had caused. He further claimed that he continued to associate with Eggleston, notwithstanding the many lawsuits in which they were engaged, because he thought Eggleston was a new person. He had gone to church with Eggleston and believed he had seen the light of day.

He testified he had not represented Eggleston in the latter's 1980 criminal proceeding yet he told Sanford Levenberg, an attorney, that he had represented Eggleston in that matter. His statements are particularly incredible because Respondent knew Eggleston had previously been imprisoned for fraud.

Although Respondent testified he had severed ties with Eggleston in either 1995 or 1996, he could not recall if he was presently defending Eggleston in any pending litigation.

Respondent presented the testimony of Lynne Variano, a questioned document expert, to discredit the contention he had written "Robert Wyshak" on certain documents in the Mollan-Masters and Pennington matters. (Respondent's exhibits RR, SS, TT and OCTC exhibits 13, 28, 34, 39, 44, 46 and 49.) Her testimony, however, is of little value because no foundation was ever established that Respondent was the source of the known exemplars from which she relied upon to form the opinion he had not written his signature on the questions documents.

Her testimony is also irrelevant, assuming the foundation to have been laid for the exemplar, because the evidence establishes Respondent acquiesced to Eggleston's signing Respondent's name to documents in several transactions including the Mollan-Masters and Pennington matters. Therefore, Variano is only confirming the obvious; that, as part of their conspiracy, Respondent had given permission to Eggleston to sign Respondent's name as needed to letters and transactional documents. It is also noted that when Respondent was given the opportunity to explain to Mollan-Masters, the Zwiebels and Pennington that he had nothing to do with the deals, he instead disappeared, obfuscated or retaliated. These are not the acts of an innocent person.

F. Findings of Law and Fact in the Zwiebel Matter

1. Count Seven; Bus. and Prof. Code section 6068(d)

In summary, this count alleges that Respondent, in Zwiebel, et al. v. Tracy, et al. (the unlawful detainer action), made untrue claims of sexual advances, perjury and schemes to commit perjury by the Zwiebels.

It has been established by clear and convincing evidence that Respondent and Eggleston agreed to present false allegations of verbal sexual misconduct against Dr. Zwiebel for the purpose of frustrating the Zwiebels' unlawful detainer action against Tracy. Thereafter, Respondent filed a summary judgment opposition containing untrue allegations by Linda Tracy and Connie McMillian about Dr. Zwiebel. In so acting, Respondent made false statements of fact in violation of section 6068(d).

2. Count Eight; Bus. and Prof. Code section 6068(d)

Like count seven, this count alleges that Respondent, as counsel for the defendants in the unlawful detainer action, filed an opposition to the plaintiffs' motion for summary judgment which contained the false declarations of Linda Tracy Brenholt and Connie McMillian that Dr. Zwiebel had engaged in various acts of sexual harassment with these two women.

This count is a duplication of count seven and is dismissed with prejudice.

3. Count Nine; Bus. and Prof. Code section 6068(f)

By filing the untrue declarations in opposition to the Zwiebels' summary judgment motion in the unlawful detainer action, as alleged in counts seven and eight, it is further alleged that Respondent advanced untrue facts prejudicial to the honor or reputation of Dr. Zwiebel.

The facts in this count rely upon the findings in count seven. Count nine has been established by clear and convincing evidence.

4. Count Ten; Bus. and Prof. Code section 6068(d)

This count provides that Respondent misled the court by filing a petition for injunction prohibiting harassment and an application for temporary restraining order against Dr. Zwiebel in which Respondent made false claims of sexual advances by Dr. Zwiebel against Tracy and her daughter.

Respondent did file such a petition and this count has been established by clear and convincing evidence.

5. Count Eleven; Bus. and Prof. Code section 6068(f)

By advancing the untrue facts in the Tracy v. Zwiebel matter as alleged in count ten, it is further alleged that Respondent advanced untrue facts prejudicial to the honor or reputation of Dr. Zwiebel.

This count differs from the allegations in count nine which concern the filing of untrue and prejudicial facts about Dr. Zwiebel in the unlawful detainer action whereas this

count addresses comparable misconduct by Respondent in alleging the same falsehoods in Tracy's restraining proceeding against Dr. Zwiebel. (OCTC exhibit 112.) It has been established by clear and convincing evidence.

6. Count Twelve; Bus. and Prof. Code section 6068(g)

By advancing untrue facts prejudicial to the honor or reputation of Dr. Zwiebel as alleged in count nine, it is further alleged that Respondent encouraged the commencement of an action or proceeding for a corrupt motive of passion or interest.

The false allegations were invented to frustrate the Zwiebel's ability to recover their Pasadena house which was unlawfully inhabited by Tracy. This is the type of conduct intended to be covered by section 6069(g) which has been established by clear and convincing evidence.

7. Count Thirteen; Rule of Prof. Conduct 2-100(A)

This count alleges that Respondent, who served as counsel of record for the defendants in Zwiebel, et al. v. Calpro Escrow Corp., et al., communicated directly or indirectly with Dr. Zwiebel or Alberta Zwiebel and informed them, inter alia, that they were required to be present at a hearing in the litigation or would be held in contempt of court and, further, that Respondent knew or should have known that the Zwiebels were represented by counsel and that this conversation was had without the knowledge or consent of that attorney.

Respondent did tell Dr. Zwiebel he had to be present at a temporary restraining hearing in the alleged matter. When Barling, who was representing the Zwiebels at the time, learned of Respondent's telephone conversation with Dr. Zwiebel, he told Respondent he was not to communicate any further with the Zwiebels. (OCTC exhibit 23.) Respondent's unpersuasive explanation was that he had called the Zwiebels directly when he could not contact Barling. (OCTC exhibit 24.) This count has been established by clear and convincing evidence.

8. Count Fourteen; Rule of Prof. Conduct 3-310(E)

This count alleges that Respondent, who at one time, had served as legal counsel for Dr. Zwiebel involving a dispute over commissions allegedly due Coldwell Banker Realty in connection with the Pasadena property, thereafter represented the defendants in the unlawful detainer action regarding the same property and in which Dr. Zwiebel was the plaintiff without the informed, written consent of Dr. Zwiebel.

In late 1992, Respondent defended Tracy in the unlawful detainer action regarding the Pasadena property after having previously written Coldwell Banker on February 26, 1992, on Dr. Zwiebel's behalf, regarding the Monrovia and Pasadena properties. (OCTC exhibit 28.) Respondent never advised Dr. Zwiebel of the conflict nor sought his consent to waiving the conflict. This count has been established by clear and convincing evidence.

9. Count Fifteen; Bus. and Prof. Code section 6068(o)(3)

This count alleges that Respondent failed to report the imposition of $80,000 in sanctions ordered by the Pasadena Municipal court on or about July 1, 1993.

On July 1, 1983, in the unlawful detainer matter, the Hon. Philip Argento ordered Tracy and Respondent to pay $80,000 in sanctions to the Zwiebels. (OCTC exhibit 30, page 1.)[14/] Respondent's appeal of the sanctions was denied. (OCTC exhibit 169.) Respondent claims he notified the State Bar of these sanctions after his appeal had been denied.

The appeal was denied a little more than two years after imposition of the sanctions. Section 6068(o)(3) does not contemplate such a delay and this count has been established by clear and convincing evidence.

G. The Freund Matter; Counts nineteen through twenty-two[15/]

Harriett Freund and her husband, who died sixteen months prior to the trial, decided in 1991 to sell their three bedroom condominium at the Lakes Country Club in Palm Desert, California. California attorney William Finestone represented them in the matter. Respondent represented Eggleston, the buyer, and also acted as the escrow and

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[14/] Judge Argento's findings in his one hundred six page order were received not for the truth of the matter asserted therein but for the limited purpose of proving and supporting the sanctions.

[15/] Upon a motion by OCTC, the Court dismissed count twenty-two with prejudice.

trustee of the Lakes Trust, the purchasing trust. According to papers prepared by Respondent, Wycliffe-Hereford, Ltd. was to deliver a $300,000 cash grant for the purchase of the condominium to the Law Offices of Robert Wyshak & Associates, which funds were to be invested in various securities. (OCTC exhibit 56, pages 14-30.)

Finestone, a certified trust and estate specialist and a Fellow of the American College of Estate Counsel, negotiated primarily with Eggleston. Finestone had no knowledge of the extent of Respondent's relationship with Eggleston and did not know that Respondent had previously been employed by Eggleston and had been Eggleston's attorney.

In a July 15, 1992 letter to Finestone, Respondent advised that his law firm had received the $300,000 cash grant for the purchase of the property and that the Freunds should deliver to Respondent a $23,435 cashier's check payable to the Wyshak trust account. Pursuant to the letter, the Freunds sent that amount to Respondent's trust account.

On November 10, 1992, Finestone filed a petition on the Freunds' behalf for an order, inter alia, directing Respondent to report information about the trust to Finestone's clients and to remove Respondent as the trustee. (OCTC exhibit 49.)[16/] Finestone sought the removal of Respondent and his law office was not a person within the meaning of the Probate Code.

[16/] Exhibit 49 was received not for the truth of the matter stated therein but to establish, in particular, that Finestone had filed the petition on November 10, 1992.

Los Angeles Superior Court Judge Edward M. Ross found all of the allegations in the petition to be true, including that the law offices of Robert H. Wyshak and Associates was not authorized to be a trustee. Respondent's law office was removed as trustee of the trust and was ordered to provide an accounting of its acts from the inception of the trust to the date of its removal. The Bank of America was appointed as successor trustee. (OCTC exhibit 51.) Respondent filed a motion "to quash the citation" and to dismiss the action for lack of jurisdiction and notice. (OCTC exhibit 56.) Respondent later on told Judge Ross that the only asset of the trust was a document entitled "cash grant." (OCTC exhibit 63.) When he failed to render an accounting, Judge Ross found him in contempt. (See OCTC exhibits 57 and 60 for the order to show cause re contempt.) The Freunds never received any money from the sale of the condominium and lost the property as well.

On January 10, 1994, the State Bar asked Respondent to respond to complaints by the Freunds concerning his actions in the Lakes transaction. (OCTC exhibit 173)[17/] Respondent wrote back on February 7, 1994 that, on behalf of the Centurion Trust, his client,[18/] he had received delivery of a "cash grant" document, had delivered that document to the Bank of America but had never received the cash required under the grant. He asserted that the money had not been transferred because the Freunds had been successful in obtaining the appointment of Bank of America as the new trustee. Respondent also told the State Bar that

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[17/] This letter was received not for the truth of the matter asserted therein but to establish a foundation for Respondent's response, exhibit 174.

[18/] There is no reference in the purchase agreement to a Centurion Trust. (See OCTC exhibit 56, pages 14-30.)

the transaction did not require a deposit into escrow of $300,000 in cash or bonds. Instead, he said it required only the delivery of a cash grant document in an amount exceeding $300,000, which document had been delivered and received.

H. Findings of Law in the Freund Matter

1. Count Nineteen; Bus. and Prof. Code section 6106

Count nineteen alleges that Respondent committed moral turpitude by not receiving and having in trust $300,000 on or about July 21, 1992 which he, as trustee, was to receive from the buyer of the Freunds' property when he had previously represented that he had received the sum and was holding it in trust and by thereafter failing to pay any funds to the Freunds for the sale of their condominium.

This count has been established by clear and convincing evidence. Respondent's claim that a "cash grant" was a worthless piece of paper is inconsistent with the terms of the transaction which clearly provide that the grant had real value. (See OCTC exhibit 56, page 17; The grantor, upon the execution of the agreement, shall deliver to Respondent a cash grant, this cash grant is an asset and Respondent "shall cause the funds from the cash grant comprising the Original Trust Assets . . to be invested . .") Respondent can not argue otherwise. His conduct in the Mollan-Masters and Zwiebel matters, which involved the same "cash grant" device, establishes a modus operandi and intent to mislead. (Evid. Code section 1101(b).) Furthermore, no reasonable person would ever sell a piece of property without receiving like value in return or, at least, retaining a security interest in the property. That did not happen here and Respondent has no reasonable explanation

for that not occurring.

Count nineteen has been established by clear and convincing evidence.

2. Count Twenty; Bus. and Prof. Code section 6068(m)

It is alleged herein that Respondent failed to respond to the reasonable status inquiries of the Freunds' attorney who had requested that Respondent provide the Freunds with information about the assets of the trust for which Respondent was acting as the trustee and, after having been ordered by the court to provide an accounting, did not do so. Neither Finestone nor Judge Ross were successful in receiving information from Respondent regarding the Trust's assets. Regardless, neither was Respondent's client, and this count is dismissed with prejudice for a failure of proof.

3. Count Twenty-One; Rule of Prof. Conduct 4-100(B)(3)

It is further alleged that Respondent failed to render an accounting to the Freunds.

However, as discussed in count two, Respondent did not have a duty under this rule to account to the Freunds for the funds he had obtained because they were not his clients. Count twenty-one is dismissed with prejudice.

III. DISCIPLINE

A. Factors in Aggravation

It is abundantly clear that Respondent's misconduct regarding Mollan-Masters, the Zwiebels and the Freunds was surrounded by bad faith, dishonesty and concealment. (Standard 1.2(b)(iii).)

Respondent blames everyone but himself for his problems. He contends the Freunds would have received their funds had they not removed him as a trustee; that Tresh and Kempka, not he and Eggleston, took Mollan-Masters' money and the Zwiebels' problems were caused by Dr. Zwiebel's inappropriate advances upon Tracy. His refusal to accept responsibility for his misconduct is an aggravating factor. (Standard 1.2(b)(v); Maltaman v. State Bar (1987) 43 Cal.3d 824, 958; Natali v. State Bar (1988) 45 Cal.3d 456, 467; Trousil v. State Bar (1985) 38 Cal.3d 337, 343.)

Respondent presented no contrition for his misconduct because throughout the discipline phase he continued to assert he had been victimized by Eggleston. His only offer, on this subject, was that, had he had the opportunity to do it all over again, he would have told the Freunds, Mollan-Masters and Pennington he knew nothing of the transactions, had not signed any of the documents and wanted nothing to do with the matters. He continued to assert he had been paralyzed, in denial and believed Eggleston to be moral and ethical.

This testimony is as incredible in the discipline phase as it was when offered in the culpability hearing. There was no witness who corroborated Respondent's proffer. To the contrary, several credible witnesses testified to his misrepresentations, acts of avoidance (and, therefore,

consciousness of guilt) and presence when fraudulent acts were discussed or planned.

Respondent's testimony is contradicted, as well, by reason and logic. How does a talented, intelligent, sophisticated lawyer who has been practicing for over forty years, suddenly become a mere pawn, incapable of individualized and rational thought? No evidence was offered to resolve this seeming conundrum. The only possible and reasonable explanation for such absence of proof is that Respondent knew what he was doing at all times.

Related to, but distinct from the above as an aggravating factor, are Respondent's indifference toward rectification for his misconduct (standard 1.2(b)(v)) as demonstrated by his meritless defenses (In the Matter of Katz (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 438) and lack of remorse for the financial havoc which he wreaked upon innocent parties.[19/] (Standard 1.2(b)(v); Conroy v. State Bar (1990) 51 Cal.3d 799, 806.) This latter harm also constitutes a separate aggravating factor. (Standard 1.2(b)(v); McMorris v. State Bar (1983) 35 Cal.3d 77, 84.)

Respondent's repeated and multiple acts of serious misconduct are further aggravation. (Standard 1.2(b)(ii); Levin v. State Bar (1989) 47 Cal.3d 1140, 1149, fn. 14.)

A very serious factor in aggravation is Respondent's unbelievable testimony and lack of candor. (Selznick v. State Bar (1976) 16 Cal.3d 704, 709; In re Rivas (1989) 49 Cal.3d 794, 802.)

[19/] Pennington is not included in this group because the evidence of the transaction was lacking.

Finally, the counts established by the evidence do not do justice to Respondent's misdeeds which were not alleged but of which he had sufficient notice. (Unchanged misconduct may be used as a factor in aggravation. Grim v. State Bar (1990) 50 Cal.3d 763, 775.) In the Zwiebel matter, he was an active part of a conspiracy to steal, commit forgery, suborn perjury and use the courts as a vehicle for those crimes. (Lee v. State Bar (1970) 2 Cal.3d 927, 941, moral turpitude includes fraud and intentional dishonesty; Grove v. State Bar (1965) 63 Cal.2d 312, 315, false statements to a judge constitute moral turpitude; In re Dedman (1976) 17 Cal.3d 229, falsification of documents is moral turpitude; Chadwick v. State Bar (1989) 49 Cal.3d 103, 110-111, agreements to lie to the Securities and Exchange Commission involved moral turpitude.) Respondent's misrepresentations and lies in the Mollan-Masters and Freund matters are contrary to honesty and good morals. (Young v. State Bar (1990) 50 Cal.3d 1204, 1217-1218; see Gold v. State Bar (1989) 49 Cal.3d 908, 914; intentionally deceiving a client is moral turpitude.)[20]

B. Factors in Mitigation

Respondent practiced law in California for forty-three years without any disciplinary problems before engaging in the instant misconduct. Ordinarily, the absence of discipline is an important mitigating circumstance when the period of time is significant. (Chefsky v. State Bar (1984) 36 Cal.3d 116, 132, fn. 10.) However, it can also be discounted where the misconduct is serious. (In re Utz (1989) 48 Cal.3d 468, 485; standard 1.2(b)(i).)

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[20] The evidence of a conspiracy or theft in the Mollan-Masters and Freund matters, on the other hand, has not been established by clear and convincing evidence.

The Court is inclined to disregard Respondent's lack of prior discipline because the misconduct is so egregious. However, it should be noted that even if it were considered as a strong mitigating factor, the recommendation would still be disbarment. (See the discussion, infra, and In re Bloom (1987) 44 Cal.3d 128, 135, disbarment despite lack of discipline for fifty-years; In the Matter of Varakin (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 189-190, thirty-two years without discipline does not preclude disbarment.)

Respondent testified he had difficulty generating business after he and Lillian Wyshak dissolved their partnership in 1990 and, as a result, he became depressed and started taking Prozac. He has only "conferred" with a doctor concerning his depression. It is assumed this evidence is offered as mitigation for extreme emotional difficulties which were allegedly responsible for the misconduct. (Standard 1.2(e)(iv.) However, no weight is given Respondent's testimony in this area because it was neither supported by expert testimony or evidence the condition no longer exists. (Rose v. State Bar (1989) 49 Cal.3d 646, 667; Ballard v. State Bar (1983) 35 Cal.3d 274, 289.)

Several character witnesses testified or wrote letters on Respondent's behalf. (Standard 1.2(2(e)(vi).) Los Angeles Municipal Court Judge James Kaddo testified that he and Respondent were two of the founding members of the Arab american Lawyers Association. Kaddo testified that Respondent, whom he has known since the early 1970's, is honest, highly respected, ethical and not a danger to the legal community. On the other hand, he had no knowledge of either the allegations or of this Court's tentative rulings regarding Respondent's culpability for certain misconduct. (In re Ford (1988) 44 Cal.3d 810, 818; it is a respondent's duty to establish that a character witness was aware of the

nature of the allegations.) He explained that this information would prejudice his testimony. When informed of some of the tentative findings including that Respondent had engaged in a conspiracy to defraud clients, Kaddo said he would not have such a high opinion of Respondent's character. Kaddo's information about Respondent is also tempered by his having had only limited professional contact with Respondent since 1991.

Los Angeles Superior Court Judge Ernest Williams, like Kaddo, knew nothing of the allegations or the Court's tentative findings regarding Respondent's culpability but testified, nonetheless, that Respondent's reputation in the community for truth, honesty and integrity were above reproach. William has known Respondent since 1955 and both have been active in the Arab American Bar Association.

Attorney James George, another member of the Arab American Bar Association, has known Respondent professionally and socially for thirty-five years. George testified that the Court's tentative findings were out of character and unbelievable because Respondent, in his opinion, is meticulously ethical and morally exacting. He added that Respondent's reputation in the legal community is of the highest quality and that Respondent does not pose a danger to the public, legal profession or administration of justice.

George's high opinion of Respondent is discounted somewhat by his own tendency to use ambiguous phrasing to rationalize his own high opinion of Respondent notwithstanding evidence to the contrary. On several occasions he explained away the allegations or tentative rulings by calling them "syllogistic" and the process "syllogistic reasoning." Syllogism deal with propositions; Respondent's trial, on the other hand, was concerned with

live witnesses, demonstrative evidence and established facts. George had problems accepting the latter.

Attorney Bruce Hochman and Donna Bullock-Carrera presented none of the problems associated with Kaddo, Williams and George. Both wee familiar with the Court's tentative rulings and testified, nonetheless, that Respondent was ethical. Hochman added that the findings were aberrational and that Respondent is not a danger to the public, legal profession or administration of justice.

Bullock-Carrera fist met Respondent four years ago at a State Bar convention. He has referred a couple of cases to her. She believes he is an honest, intelligent and ethical attorney.

Verna Bradley, a clinical social worker with a doctorate from the Santa Ana Institute, provided therapy to Respondent about ten years ago for several months and has maintained a nonprofessional relationship with him since that time. In her opinion, the Court's findings are not characteristic of Respondent who is truthful, ethical and tries to help others.

Respondent also presented five letters from attorneys, one of whom is his former wife, as evidence of his good character. Each wrote that Respondent was competent, diligent and ethical. One of them, John Gerro, did not establish that he was aware of the nature of the allegations. (Respondent's exhibit MM.) Two others, Sidney Machtinger and William Shibley, found it inconceivable Respondent could have committed the wrongs and asserted he is a man of integrity. (Respondent's exhibits NN and PP.) Zaher Hanna wrote that Respondent's conduct was aberrational and inconsistent with his good character. (Respondent's exhibit KK.) Lastly, Lillian Worthing Wyshak sough leniency for

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Respondent, not necessarily because of his character, but because any punishment would be especially destructive to herself and their four daughters, ages thirty-one to thirty-four. (Respondent's exhibit OO.)

Notwithstanding the problems associated with some of the character witnesses, the Court is satisfied that an "adequate," as opposed to "extraordinary" demonstration of Respondent's character, has been presented.

C. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the accused attorney, but to protect the public, to preserve public confidence in the legal profession and to maintain the highest possible standard of conduct for attorneys. (Chadwick v. State Bar, supra, (1989) 49 Cal.3d 103, 111; standard 1.3.) In determining the appropriate sanction to impose in each case, the mitigating and aggravating circumstances must be considered and balanced, along with the specific discipline recommended by the standards for the particular misconduct found, with due regard for the purposes of imposing discipline. (Standard 1.6(b).)

The applicable standards in this proceeding for Respondent's violations of Business and Professions Code section 6068(d) [two counts], 6068(f) [one count], 6068(g) [one count], 6068(o)(3) [one count]; 6103 [one count] and 6106 [two counts] and Rules of Professional Conduct 2-100(A) [one count] and 3-310(E) [one count] are 2.2(a), 2.3 and 2.6.[21/] Disbarment is the appropriate recommendation

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[21/] Standard 2.2(a) provided that "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated

under each depending upon the severity of the acts, the amount of the funds misappropriated and the gravity or harm to the victim. In determining the appropriate degree of discipline to recommend, the standards are the starting guidelines. (In re Young (1989) 49 Cal.3d 257, 267, fn. 11.) Additionally, the Court must consider whether the recommended discipline is consistent with or disproportionate to prior reported decisions on similar facts. (See, e.g., Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310-1311.)

The California Supreme Court has a strong aversion to attorneys who commit perjury and theft. In In re Allen (1957) 52 Cal.2d 762, the attorney was convinced of soliciting witnesses to commit perjury in a personal injury

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is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

Standard 2.3 states that "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Standard 6.2 states, in part, that culpability of a member for violating Business and Professions Code sections 6068 and 6103 "shall result in disbarment or suspension depending on the gravity or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3"

action.[22/] In ordering his disbarment the disbarred for his theft of $25,000 from a client notwithstanding his expressions of remorse, cooperation in the disciplinary proceeding, full restitution to the victim before the commencement of disciplinary proceedings and sixty-seven letters attesting to his competency, honesty and character by sitting judges, practicing attorneys, clergyman and former clients. "Although we recognize the substantial evidence of petitioner's efforts at rehabilitation, our foremost concern is to protect the public, the profession, and the judiciary. (Citation omitted.) Moreover, when serious criminal activity is involved, 'evidence of any rehabilitation will be more persuasive if offered during any reinstatement proceedings after disbarment.'" (At p. 298.)

The attorney in In re Ford, supra, 44 Cal.3d 810, who embezzled $21,800 of client funds, also presented strong evidence of mitigating circumstances but was still disbarred. For twenty years he had had an exemplary career, first with the Judge Advocate General Corps of the United States Army and then as associate and partner in two law firms.

In re Jones, supra, 5 Cal.3d 390, wherein an attorney who was convicted of perjury and offering false evidence and received only one year actual suspension from the practice of law, is not applicable in the instant proceeding. Jones had offered into evidence in a breach of contract trial a letter purportedly establishing the existence of an agreement between his clients and the individual they were suing. The Supreme Court found that the facts justified

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[22/] Criminal conviction referral cases are discussed because Respondent's actions in the Zwiebel matter rose to that level although he has never been formally charged with any crimes because of that transaction.

disbarment. Nevertheless, if ordered his suspension rather than disbarment because Jones had no prior record of discipline, presented evidence of his good reputation as a lawyer, businessman, and civic and social leader, had witnesses testify to his integrity in handling large sums of money, had served honorably for four years in the Air Force and was a reserve lieutenant colonel, was sixty-six years old, had had difficulty in obtaining employment because of his age and criminal record, was in poor health, had ten year-old twins to support, was in financial difficulties, had suffered the ignominy of a criminal conviction, had served time in prison and already had been suspended from the practice of law for over five years. Jones was culpable of only one act of misconduct, little aggravation, and abundant mitigation.

Respondent's misleading testimony and lack of contrition indicate he has not learned from the experience and may well continue his misdeeds if he is not disbarred. (Cooper v. State Bar (1987) 43 Cal.3d 1016, 1029.) Furthermore, he has not presented much mitigating evidence. The character testimony (and even the lack of prior discipline) pale by comparison to the aggravating factors. Therefore, under the circumstances, a period of actual suspension and probation can not adequately protect the public. (Id., at p. 1031.) The lack of a prior record and a distinguished career are not enough to assure that Respondent will act properly. As the Supreme Court observed in Bowles v. State Bar (1989) 48 Cal.3d 100, 110, "(p)rior exemplary conduct and a distinguished career may be relevant as factors indicative of the probability that misconduct will not likely recur, but if the attorney guilty of a pattern of serious misconduct does not show that he is presently able to avoid such misconduct, appropriate action must be taken to protect the public."

ACCORDINGLY, it is recommended that Respondent, Robert H. Wyshak, be disbarred from the practice of law in the State of California.

It is further recommended that Respondent be ordered to comply with the requirements of subdivision (a) of the rule 955, California Rules of Court, within thirty (30) calendar days of the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order.

COSTS

It is recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6068.10 and that those costs be payable in accordance with section 6140.7 (as amended effective January 1, 1997.)

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Pursuant to Business and Professions Code section 6007(c)(4), it is hereby ordered that Respondent be enrolled as an inactive member of the State Bar effective three (3) days after service of this decision by mail. (Rule of Procedure 220(b).)

DATED: February 26, 1998

/s/
MICHAEL E. MARCUS
Judge of the State Bar Court

Appendix 4

Filed
September 21, 1999

PUBLIC MATTER -- DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	
	)	Nos. 92-0-20339
ROBERT H. WYSHAK	)	95-0-13441
	)	
A Member of the State Bar.	)	OPINION ON REVIEW
	)	

Respondent Robert H. Wyshak requested that we review the recommendation of a hearing judge that he be disbarred. Respondent was admitted to practice over forty years before the found acts of misconduct in four matters and has no prior discipline. Independently reviewing the record, we agree with the findings of the hearing judge in those four matters and adopt his recommendation. The record shows that, while acting as escrow agent and trustee, respondent engaged in multiple acts of dishonesty and concealment, which defrauded two separate sellers of valuable real estate. In a third matter, respondent engaged in misconduct, including some causing serious harm to the victim and the honest administration of justice, by advancing in court unfounded charges of sexual harassment in order to delay or defeat an unlawful detainer action. In a fourth matter, respondent disobeyed a federal court order to produce documents in a civil case.

All together, respondent committed a wide variety of serious ethical violations in the four matters, none of which is excused by the evidence he has offered herein. Considering the extreme seriousness of respondent's misconduct, his showing in mitigation was insufficient to justify lesser discipline. The very factors that caused the hearing judge to recommend disbarment cause us to do so as well; notably, the grave seriousness of respondent's misconduct coupled with his lack of any meaningful regret, understanding, insight, or acceptance of any responsibility for the consequences of his misconduct.

I. Statement of the Case.

A. Respondent's Background.

Respondent graduated from Harvard Law School and was licensed to practice law in California in 1948. He served in the U.S. Attorney's Office in Los Angeles and headed its Tax Division, several years after admission. He then became law partners with his wife, Lillian Wyshak. The Wyshaks had a very well known Beverly Hills tax practice for over 25 years until they divorced and dissolved the partnership. In the early 1980's, respondent started practicing on his own, remaining officed in Beverly Hills with listed branch offices in Palm Springs, Costa Mesa, and Washington D.C. At times, respondent's sole practice was not nearly as successful as when he practiced with Lillian. All of the misconduct occurred during respondent's sole practice. Respondent also served briefly as a judge pro tem hearing small claims cases.

B. Respondent's Dealings with Eggleston.

Sometime in 1981 or 1982, respondent met George Eggleston. He was impressed with Eggleston's seemingly wealthy, successful background and persuasive abilities. He had advised Eggleston in about 1982 about the tax shelter aspects of an alcohol fuel idea. However, respondent knew Eggleston had serious problems with tax shelters he had organized and that, sometimes in the early 1980's, Eggleston was convicted of tax evasion and several six years in prison.[1] After Eggleston's release from prison in about 1988 or 1989, he and respondent visited socially from time to time. Below, respondent testified that he never hired Eggleston as an employee and never had a business relationship with him. Respondent admitted, in the hearing department, that he lied when he gave contradictory testimony under oath in an earlier federal civil deposition.

C. Culpability Findings and Related Facts.

1. The Mollan-Masters Matter.

Charlotte Rene Mollan-Masters was an educational consultant who lived in Ashland, Oregon and had no prior experience with real estate. Her mother had died, and her father was ill. Mollan-Masters was trustee of her parents' trust. She wished to sell her father's Palm Desert condominium, which was in the Palm Valley Country Club development. The real estate market was down and there were no buyers after about a six-month listing period. However, Eggleston made a "creative" bid for the property. Respondent was to serve as trustee and as escrow. Mollan-Masters did not know respondent or Eggleston and did not

[1] Respondent did not represent Eggleston in his federal criminal prosecution.

negotiate directly with Eggleston or respondent. Eggleston bargained with Mollan-Master's realty agent. Mollan-Master's personal attorney did look superficially at respondent's background and found he was a Harvard Law graduate and had other positive qualities.

The deal Eggleston put together and respondent drafted into escrow instructions and a trust agreement was unusual in that it provided for a purchase price of $220,000 to be paid over several years from the earnings of a "cash grant" of $218,853 to be placed in escrow and in trust with respondent serving as trustee. The funds represented by the cash grant were to be released to the seller in three equal, annual installments of $72,951. No real property secured the purchase contract, but the trust agreement called for the funds to be invested in government or corporate bonds. Respondent received a fee of $1,000 for his escrow services.

There was ample documentation that the $218,853 grant was to be in cash and that respondent represented that it had been received in escrow as a cash or equivalent payment. The purchase contract recited that a "cash funded irrevocable trust" was to be "established for seller." The irrevocable trust agreement respondent prepared made several references to the cash grant. It recited the delivery of it to respondent as trustee and respondent acknowledged receipt of it "as the Original Trust Assets." This trust agreement required that the "funds from the Cash Grant" be placed in specific types of investments. Exhibit 1 attached to the irrevocable trust agreement was a document entitled "cash grant" in the amount of $218,853 "which amount is equal to the sum of the [payments to Mollan-Masters]." The cash grant recited that it was delivered to the trustee on the effective date of the trust. Finally, respondent's escrow settlement statement dated June 23, 1992, showed credits to the escrow account of $218,853.

At the time escrow closed in June 1992, respondent sent Mollan-Masters $25,000. She never received any more funds from the sale. It is undisputed that no funds supporting the cash grant were ever received in escrow.

At the end of August 1992, Mollan-Masters wrote to respondent asking a number of questions about the sale and the irrevocable trust. Respondent replied to her by letter, stating in part that the only bank trustee account established for the assets of the irrevocable trust was with his law firm. Respondent concealed that there never were any assets in this account at the time. Mollan-Masters replied on September 1, 1992, expressing concern that she had received no proof that the trust was funded, that she went ahead with the sale because of respondent's sterling reputation, and that she and her lawyers want documentation supporting the transfer of property as "[a]ny good escrow firm would provide. . . ."

The sale contract required Mollan-Masters to demand in advance that respondent pay the first installment due at the end of June 1993. She made this demand, but respondent did not reply, ignoring repeated phone calls and even requests sent by certified mail. In November 1993, Mollan-Masters saw respondent by surprising him at his Beverly Hills office. He told her that he had been duped in that others were responsible for not funding the trust. Respondent solicited a $10,000 retainer fee from Mollan-Masters to represent her against those allegedly at fault. He told her who was at fault, but did not mention Eggleston, mentioning instead other victims of Eggleston's business deals. Mollan-Masters declined respondent's offer for representation and never heard from him. Unknown to Mollan-Masters, the Palm Desert property went into foreclosure.

As found by the hearing judge, title to this property was held by one or more of Eggleston's entities. Ultimately, Eggleston's in-laws, the DeMonds, were living in the property. In September 1994, the Palm Valley Homeowner's Association started an unlawful detainer action to remove the DeMonds. Respondent opposed vigorously this action.

At the State Bar Court trial, respondent testified that the "cash grant" was nothing more than a promise by the buyer to pay periodically.

The hearing judge found that respondent committed moral turpitude in violation of section 6106 by falsely representing that he had received the purchase price as cash and was holding it in trust. However, the hearing judge found that respondent did not violate Business and Professions Code section[2] 6068, subdivision (m) or rule 4-100(B)(3) Rules of Professional Conduct of the State Bar[3] as those duties pertain to clients, and Mollan-Masters was not a client. Accordingly, the hearing judge dismissed the latter two charged violations with prejudice.

We adopt those findings.

2. The Pennington Matter.

In this matter, the hearing judge only found respondent culpable of failure to comply with a federal district court's discovery order. (§6103.) Our review of the

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[2] Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

[3] Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar.

record supports that finding. It is therefore unnecessary to detail the Pennington transaction except to set forth facts showing that respondent was personally involved in actions taken in this matter. Those facts support the hearing judge's findings in the other matter.

One of the homes William Pennington owned was in Indian Wells, California, with an adjacent vacant lot. One of Eggleston's trusts offered to buy the Indian Wells property for $1.7 million with about $300,000 to be paid in cash and the rest in periodic payments per a promissory note unsecured by any realty. The promissory note payment stream was described as secured by Ginnie Mae or Hong Kong bonds. Respondent was to act as escrow agent.

Shortly after the deal, Pennington hired counsel to undo it, but it was too late. Pennington's counsel tried to get information from respondent as to whether or not respondent actually held the bonds. Respondent's first reaction was that he did not create this transaction and did not sign the papers bearing his name. Respondent confronted Eggleston who assured him there were bonds backing up the payments. Respondent testified that he researched a Goldman, Sachs account which contained valuable bonds and then no longer objected to Eggleston's deal with Pennington. Respondent also testified that when he learned that Eggleston had forged his name he neither reported Eggleston to any authorities -- he claimed he did not know to whom he should report Eggleston -- nor did he disassociate himself from Eggleston.

In May 1992, Pennington filed a federal diversity-of-citizenship fraud lawsuit against respondent, Eggleston, the real estate broker and Eggleston's cohorts seeking punitive damages. The case was assigned to United States District Court Judge Spencer Letts, who was concerned from the

outset about the unusual realty transaction -- so unusual that even counsel could miss the import of it -- and that it seemed to Judge Letts that Pennington was unaware that he was in jeopardy for having entered into it.[4]

The hearing judge decided that because the State Bar did not introduce sufficient clear and convincing evidence about the most serious charges in the Pennington matter, the only charge sustained was the section 6103 violation arising from respondent's failure to comply with Judge Lett's discovery order to produce certain documents. We agree with the hearing judge.

Concerning respondent's failure, he admitted, in his testimony in this proceeding that he did not provide the ordered discovery. His purported defense was that he deemed it advisable to assert his privilege against self-incrimination.

In sum, we adopt the hearing judge's culpability determination that respondent violated section 6103. In addition, we adopt his dismissals with prejudice of the charged rule 3-310(B)(1) (representation of adverse interests), section 6106 (moral turpitude) and section 6068, subdivision (m) (communication with client).

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[4] A partial transcript of a pretrial hearing Judge Letts conducted in the civil case shows that by the time of the hearing, the Judge had gotten a sense, although he stressed it was not yet a proven finding, that there might not be an honest person in this case and he suggested to Pennington's attorney that Pennington needed to protect his position in the deal as soon as possible.

3. The Freund Matter.

This transaction to sell property owned by the Freunds was structured similarly to the Mollan-Masters matter. The Freunds owned a three bedroom condominium at the Lakes Country Club in Palm Desert, California. Mrs. Freund had the condominium furnished by a decorate, and she testified that it was in very good condition. She decided to sell it with all the furnishings. The Freunds were represented by attorney William Finestone, a certified specialist in trust and estate planning with considerable experience in that field.

One of Eggleston's trusts offered to buy the Freunds' home. Respondent acted as escrow agent. The deal was finalized in July 1992. The purchase price was $238,305.30, to be paid in semi-annual installments of $6,216.66 with a lump-sum payment of the $207,322 balance on January 3, 1995. To support the purchase, Eggleston's trust was to promptly deposit in escrow a "cash grant" of $300,000. Those funds were to be invested in unspecified government securities or investment grade instruments. Respondent was to act as trustee of the invested funds. There was no realty securing the sale.

On July 15, 1992, respondent advised Finestone that he held the $300,000 cash grant. The documents prepared by respondent were similar to those in the Mollan-Masters matter. Respondent produced on his letterhead an "Opening Statement" of the trust dated July 21, 1992, showing "initial trust assets" of $300,000 represented by the cash grant.

A few months after the deal was finalized, Finestone was unable to get any information from respondent about what assets were in trust. Mrs. Freund was able to visit the property and found that the property looked terrible, in part

because all of her quality furnishings had been replaced with old furniture.

Finestone also found a legal problem with the trust respondent created: that a law office was not a qualified trustee under the Probate Code. In November 1992, Finestone petitioned the Superior Court to remove respondent as trustee. After vigorous opposition by respondent, which stretched the matter well into 1993, respondent was removed and a bank was named successor trustee. The Superior Court held a hearing before removing respondent. The probate judge asked respondent about the assets of the trust. Respondent replied that the only asset was the piece of paper he produced entitled "Cash Grant." When respondent was unable to account to the probate court for any assets, the judged cited him for contempt.[5]

The Freunds never received reconveyance of their property nor any funds.

In February 1994, respondent wrote a letter to the State Bar stating in part that the "cash grant" was not required to represent any cash at the time it was given, but only to consist of money from time-to-time to satisfy the payment schedule. Respondent contended that only the piece of paper entitled "cash grant" was required to be received in the trust and that is all that respondent held.

The hearing judge found respondent culpable of committing moral turpitude by representing that he held $300,000 in trust when he did not, permitting escrow to close without receiving and holding that $300,000, and

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[5] As the parties point out in their briefs, the hearing judge erroneously found that the probate court found respondent in contempt. We correct this minor error.

failing to pay funds to the Freunds. The hearing judge dismissed with prejudice charges of violation of section 6068, subdivision (m) (communicate with client) and of violation of rule 4-100(B)(3) (failure to render an accounting) on the ground that there was no attorney-client relationship between the Freunds and respondent as required by those authorities. We adopt the hearing judge's findings with the small correction we noted ante. In addition, we adopt his dismissals with prejudice.[6]

4. The Zwiebel Matter.

In March 1992, Dr. Dirk Zwiebel had served for 29 years as a clinical psychologist and theologian.

Zwiebel and his wife, Alberta, had a home in Monrovia, California. They needed to move to North Carolina to be close to one of the Zwiebel's parents who was very ill. They decided to lease their Monrovia home. Respondent came to look at the property as a prospective tenant and promoted his background, even stating that he had earlier been a federal judge. Respondent also pointed out that he worshipped at the same church as the Zwiebels in Pasadena. However, the Zwiebels did not apparently know respondent before this meeting. Eggleston soon contacted the Zwiebels and proposed a deal to refinance both their Monrovia house and a valuable house they owned free-and-clear in Pasadena.

The Zwiebels were committed to a trip to Israel and there was pressure to complete the deal. Eggleston offered a complex lease-financing arrangement. One of Eggleston's

[6] On the motion of the State Bar, the hearing judge dismissed without prejudice a charged violation of section 6103 (failure to obey a court order) in the interest of justice. We adopt that dismissal.

trusts would provide the financing. One of the loans involved in the transaction was to be secured by a promissory note and the cash payments on the note would be secured by bonds to be held in trust by respondent, acting as trustee. Eggleston's trust was also given an exclusive option to buy the Monrovia property. The agreement which was prepared included the Zwiebels' Pasadena property, but according to Ms. Zwiebel, the document she signed did not include reference to the couple's Pasadena property.

Before leaving for Israel, respondent asked the Zwiebels to give a limited power of attorney to a relative of Eggleston, Gorton DeMond. Dr. Zwiebel understood that DeMond was an elderly person who was not known to him. Zwiebel questioned respondent as to whether giving a power of attorney to DeMond was wise. Respondent replied that DeMond was honest "as the day was long" and that DeMond would give the funds of the refinancing to respondent to hold in trust. Dr. Zwiebel gave the requested power of attorney to DeMond. It was then used by Eggleston or others and without knowledge to the Zwiebels to obtain outside loans for both Zwiebel properties at high rates of interest and with very short repayment periods.

When the Zwiebels returned from Israel they found Linda Tracy, an Eggleston acquaintance, living in their Monrovia property. The Zwiebels asked respondent to revoke the deal because it was not what they had agreed to. Respondent failed to act as requested. Eggleston told Dr. Zwiebel that if he sued him and respondent, that they would grind him into the ground.

Dr. Zwiebel was unable to get information from respondent as to the refinancing funds to come from Eggleston's trust. He even tried without success to locate respondent at any one of the three office addresses

respondent listed on his letterhead. Both properties ended up in foreclosure, and Dr. Zwiebel was very bitter about losing what he considered his retirement security.

At one time, a realtor had a listing to sell both Zwiebel properties. This realtor demanded a share of the refinancing proceeds. Dr. Zwiebel related this demand to respondent who, in February 1992, offered to represent Zwiebel in opposing the realtor's demand. The record shows that respondent wrote a letter opposing the realtor's demand.[7]

In July 1992, the Zwiebels filed an unlawful detainer action in Pasadena Municipal Court against Eggleston and those affiliated with him who occupied the Monrovia property. Respondent represented Tracy and demurred successfully to the complaint. Next, the Zwiebels hired a new attorney, Emanuel Barling Jr. He filed a multi-count fraud action against Eggleston, respondent, and others in Los Angeles Superior Court; dismissed the earlier unlawful detainer action; filed a new one; and moved for summary judgment. To defend and induce the Zwiebels to drop their action, Eggleston contrived a sham claim for Tracy that Dr. Zwiebel had sexually harassed her. Respondent was present when this scheme was discussed. He not only failed to object to it, but drafted papers filed in court to advance it. This spurious scheme ended when Tracy decided that she would not lie any longer to accuse Dr. Zwiebel. Respondent merely went along with Eggleston's response that declaration by Tracy and others charging Dr. Zwiebel with harassment had already been sent to the Zwiebel's counsel Barling and it was too late to recant.

[7] Respondent's letter to the realtor opened by stating that respondent represented Gorton DeMond and the Centurion Trust, a trust for which Dr. Zwiebel was a beneficiary.

The testimony of paralegal Rebecca Fedorow, who worked for Eggleston,* was relevant to several counts, but especially to the Zwiebel matter. Fedorow testified that she was present at meeting at which respondent and Eggleston were also present. At different meetings, Eggleston told her that he had forged a power of attorney used to refinance one of the Zwiebels' property, that names of some of the trusts used for the realty transactions were chosen arbitrarily from place names on a map of England, and that some of the trusts existed in name only. Fedorow also saw Eggleston sign respondent's name to pleadings in the Zwiebel and Pennington matters while respondent was present and to which respondent did not object. Fedorow was also present in a meeting with Eggleston, respondent, and others when Connie MacMillan, an acquaintance of Tracy, stated adamantly that she would not lie in court to falsely assert that Dr. Zwiebel sexually harassed Tracy. In response to this, Eggleston said that MacMillan's declaration to the contrary had already been sent to opposing counsel and could not be changed. Fedorow observed respondent take no action. She also observed that respondent did not speak out in protest.

In the Pennington matter, respondent told Fedorow that there were no bonds to support the payments due Pennington. She observed respondent become very nervous about this lack of security as the parties and Judge Letts were demanding to know about it.

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* According to Fedorow, Eggleston hired her and assigned her to work for an attorney named Levenberg. However, Fedorow did not do any work for Levenberg and spoke with him only two or three times by phone. Fedorow's work appeared to be to handle various litigation involving Eggleston and his associates. Fedorow held a law degree from the University of New Mexico, but was not a member of the California Bar.

In the Zwiebel matter, also relevant was the testimony of Dan Kempka, who was a computer business principal. He had become involved with Eggleston because Eggleston had secured financing for Kempka's business. Thereafter, relations soured between Kempka and Eggleston. One reason was that Kempka learned that Tracy was put on the payroll of Kempka's business just to keep her paid to be "kept on" in the Zwiebel matter and to do whatever Eggleston asked Tracy to do because she needed money. Eggleston told Tracy that in the unlawful detainer action by Zwiebels, Tracy should "tell the story" that Dr. Zwiebel had made sexual advances to her in his Pasadena home. Eggleston said, at a meeting Kempka attended with respondent also present, that this strategy of a sexual harassment claim would prolong the litigation as long as possible so that the Zwiebels would just give up. Eggleston said that Tracy would do anything as she needed the money.

From the above facts, the hearing judge concluded that respondent committed five violations of subdivisions of section 6068 in making untrue allegations against Dr. Zwiebel, advancing untrue facts prejudicial to Zwiebel, and encouraging an action for a corrupt motive. (§6068 subds. (d), (f) and (g).) The hearing judge concluded that one of the charged violations of subdivision (d) of section 6068 in the Zwiebel matter was duplicative of another charged violation of the same subdivision. Accordingly, after finding respondent culpable of the first charged violation, the hearing judge dismissed the second charge with prejudice. We adopt that dismissal.

While the unlawful detainer action was pending and while respondent knew the Zwiebels were represented by Barling, respondent communicated directly with Dr. Zwiebel that Dr. Zwiebel had to be present at a court hearing or risk being held in contempt of court. The hearing judge found

that, as a result, respondent wilfully violated rule 2-100(A) by communicating this information directly to Zwiebel without the knowledge or consent of his counsel.

In July 1993, Pasadena Municipal Court Judge Philip Argento filed a decision, more than 90 pages in length, ordering respondent to pay sanctions of $80,000 under section 128.5 of the Code of Civil Procedure. This document was admitted only for the purpose of showing that Judge Argento's order had a reasoned basis.[9] Respondent failed to report this sanction to the State Bar, claiming it was on appeal. He claimed he reported it two years later after his appeals had failed. The hearing judge concluded that respondent had wilfully violated section 6068, subdivision (o)(3).

Finally, the hearing judge found that respondent wilfully violated rule 3-310(E) by representing different parties adverse to each other without informed written consent.

We adopt the hearing judge's findings in the Zwiebel matter and add an additional factual finding, based on undisputed evidence, that respondent's advancement of spurious charges of sexual harassment against Dr. Zwiebel caused great anguish to the Zwiebels.

D. Findings and Related Facts in Mitigation and Aggravation.

Respondent practiced for over forty years with no record of discipline prior to the misconduct found here. (Rules of Proc. of State Bar, title IV, Stds. for Atty.

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[9] Judge Argento described the creation of his decision re sanctions as the most arduous task he had performed as a judge.

Sanctions for Prof. Misconduct (standards), std. 1.2(e)(i).)

After respondent dissolved his law practice with his former wife, he had difficulty developing clients and became depressed. He consulted with a doctor and began taking medication, but the hearing judge gave no weight to this circumstance as it was neither supported by expert evidence nor established that the condition had been resolved as required by standard 1.2(e)(iv).

The hearing judge considered mitigating respondent's character evidence. (std. 1.2(e)(vi)). This included witnesses who testified favorably on respondent's behalf and established that he had been an important contributor to the founding and support of the Arab-American Bar Association. However, the hearing judge's evaluation of some of this evidence was tempered by some witnesses who appeared either uninformed about the charges and tentative findings against respondent or were limited in their evaluation of him. We adopt the hearing judge's mitigation findings.

In aggravation, the hearing judge found that respondent's misconduct in the Mollan-Masters, Freund and Zwiebel matters was surrounded by bad faith, dishonesty and concealment. (std. 1.2(b)(iii)). The judge also found aggravating that respondent engaged in repeated and multiple acts of serious misconduct. (std. 1.2(b)(ii.) Respondent's lack of contrition for the effect of his misconduct and indifference to rectifying those effects were also found to be aggravating. (std. 1.2(b)(v).) Finally, the hearing judge found to be very seriously aggravating, respondent's incredible testimony and lack of candor.

II. Discussion

A. Culpability.

Respondent levies many attacks on the findings. Overall, he claims that he had no dealings with the victims until after the transactions were completed, that he had no attorney-client relationship with the victims, and that Eggleston is to be blamed for all the victims' losses. Respondent further contends that the findings deviated from the notice of charges, that certain hearsay evidence was improperly received, and that other evidence was not adequately weighed by the hearing judge. Independently reviewing the record (In re Morse (1995) 11 Cal.4th 184, 207), we have concluded that respondent's claims are without merit and that the evidence establishing his culpability is clear and convincing.

1. The Mollan-Masters and Freund Matters.

In the Mollan-Masters and Freund matters, respondent patently deceived both sellers that the escrows he administered contained the dollar amounts of the property purchase price when he knew that they did not. Knowing that the escrows were bare or nearly bare of buyers' consideration, respondent defrauded the sellers by nevertheless conveying the properties. Respondent's misleading use of the device that he and Eggleston referred to as a "cash grant," which was nothing more than an "empty" piece of paper, aided his deception. The use of that term clearly conveyed to the sellers, bolstered by the documents respondent created, that adequate consideration for the sales existed.

Respondent's testimony that Eggleston committed all the wrongs in these matters and that he did not know of and was ignorant of Eggleston's real estate scams was not deemed credible by the hearing judge. The hearing judge's credibility determination calls for great deference in our review, is well supported by the evidence, and the judge's reasoned decision. We agree with that determination. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); see also Kelly v. State Bar (1988) 45 Cal.3d 649, 655; In the Matter of Primas (Review Dept. 1988) 3 Cal. State Bar Ct. Rptr. 824, 829.)

Respondent's belated attempt to introduce questioned documents evidence through expert witness testimony allegedly showing that Eggleston signed respondent's name to the documents was properly devalued by the hearing judge for lack of foundational evidence. Moreover, abundant evidence showed that, in these two matters, Respondent personally drafted the escrow instructions and the escrow settlement statements. Shortly after both transactions, he dealt contemporaneously with the sellers, never disavowing the transactions or the supporting documents.

Moreover, even if, arguendo, we were to credit fully respondent's expert handwriting evidence, it would not show that all the key documents bearing his signature were signed by another.

Unquestionably, respondent's misconduct in both the Mollan-Masters and Freund matters involved moral turpitude as found by the hearing judge. Respondent's attempt to show that he did not stand in an attorney-client relationship affords no defense and ignores the evidence that in the Mollan-Masters matter he sought to be retained as the victim's attorney after deceiving her. Whether or not respondent sought to act as an attorney for these parties, he

was the escrow agent and trustee in both transactions. Decisions of the Supreme Court make clear that, in the capacity of escrow agent, holder or trustee, respondent owed the sellers the same high duty of honesty and obedience to fiduciary duty as if he were acting as their attorney. (See, e.g., Crooks v. State Bar (1970) 3 Cal.3d 346, 355, Simmons v. State Bar (1969) 70 Cal.2d 361, 365, Johnstone v. State Bar (1966) 64 Cal.2d 153, 155-156.) In addition, respondent's acts of deceit justify attorney discipline as conduct involving moral turpitude, regardless of whether respondent was acting as an attorney. (§6106; Marquette v. State Bar (1988) 44 Cal.3d 253, 262.)

2. The Pennington Matter.

In the Pennington matter, respondent's own testimony shows that he failed to obey the federal district court's discovery order to produce documents and thus violated section 6103. Respondent's sole excuse was that he was seeking to assert Fifth Amendment rights. Yet, he never provided evidence that he timely raised his Fifth Amendment privilege claims in Federal Court. In addition, respondent did answer interrogatories in the same civil case. Further, it appears that, even if respondent had timely perfected his constitutional claims, it would not have protected his refusal to produce the documents in contravention of the court order to do so. (See, e.g., United States v. Doe (1984) 465 U.S. 605, 610-613 [Fifth Amendment protects against compelled production of documents only if the production has both a "testimonial" and "incriminating" effect against a natural person]; see also Braswell v. United States (1988) 487 U.S. 99, 102-103.)

3. Zwiebel Matter.

Respondent's many breaches of professional ethics were manifest in the Zwiebel matter. The most serious charges surrounded his prosecution for one of Eggleston's tenants of an untenable claim of sexual harassment by Dr. Zwiebel. The evidence, including the testimony of Dr. Zwiebel and Ms. Fedorow, amply established that respondent had no basis for the claims against Dr. Zwiebel and knew they were untenable. Respondent's misconduct harmed the Zwiebels and the administration of justice in several important, serious respects. At two stages of the civil process, he made untrue charges against Dr. Zwiebel to frustrate the Zwiebels unlawful detainer action, in violation of section 6068, subdivision (d). One of these instances of false statement also constituted the advancement of untrue facts prejudicial to the reputation of Dr. Zwiebel in violation of section 6068, subdivision (f). Finally we agree with the hearing judge that respondent's acts also served to encourage the specious sexual harassment claim for a corrupt motive or interest in violation of section 6068, subdivision (g).

Respondent's claim that the conclusions of the hearing judge were duplicative is not well taken. The judge's conclusions were directed at different offenses and, where they involved the same section of the Business and Professions Code, they arose from different acts of respondent. Thus, the judge found multiple violations, not duplicative violations. The hearing judge was sensitive to avoiding duplicative findings and conclusions, and he refused to find respondent culpable of the section 6068, subdivision (d) violation in count eight of the charges because it duplicated the misconduct charged and found in count seven. Moreover, we and the Supreme Court have found attorneys culpable of different subdivisions of section 6068 concerning offenses directed at the administration of justice. (Lebbos v.

State Bar (1991) 53 Cal.3d 37, 42, 45; Sorenson v. State Bar (1991) 52 Cal.3d 1036, 1042; In the Matter of Varakin (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 187.) In sum, none of the hearing judge's culpability determinations are duplicative.

In the Zwiebel matter, respondent also communicated directly with Dr. Zwiebel when he knew that Dr. Zwiebel was represented by counsel upon a subject of controversy in wilful violation of rule 2-110(A). This contact occurred during litigation. We uphold the hearing judge's findings and reject respondent's meritless defense that the communication was justified or reasonable. Respondent had no excuse for the communication. Had he meant to extend a courtesy to Zwiebel's own counsel, a much different method and communication would have been appropriate. It is well settled that rule 2-110(A) and its predecessor former rule 12 are therapeutic rules designed, in part, to shield the represented party from well-meaning, but misguided advances by an attorney to an adverse party as well as deliberately improper ones. (Abeles v. State Bar (1973) 9 Cal.3d 603, 609 [construing former rule 12]; see also Mitton v. State Bar (1969) 71 Cal.2d 525, 534.)

Respondent does not specifically attack the hearing judge's conclusion that he violated rule 3-310(E) by representing conflicting interests regarding the Zwiebel's Pasadena property. And, in any event, the record clearly supports the hearing judge's conclusion.

Respondent claims that he was not required to report the $80,000 in sanctions that Municipal Court Judge Argento imposed on him pursuant to Code of Civil Procedure section 128.5, because respondent had appealed the sanctions order. However, we rejected that claim in In the Matter of Respondent Y (Review Dept. 1998) 3 Cal. State Bar Ct.

Rptr. 862, 867. The duty to report sanctions timely pursuant to section 6068, subdivision (o)(3) is not excused solely because of the pendency of an appeal. Ibid. We uphold and adopt the hearing judge's culpability conclusion.[10]

We cannot find merit in the procedural contentions respondent advances. He first claims that the findings supporting the disbarment recommendation were not adequately reflected in the charges. Yet, respondent's only specific detail of this claim is in the Pennington matter. In that matter, the hearing judge found respondent culpable of only one count of misconduct, which was expressly and adequately charged. Other findings of fact made by the hearing judge in the Pennington matter were in the nature of background facts regarding the charged misconduct and were well established by the evidence.

Similarly unavailing is respondent's objection that the hearing judge erred by admitting evidence under Evidence Code section 1223, the so-called "coconspirator's exception" to the hearsay rule. Respondent's prime objection to the hearing judge's use of the coconspirator exception to the hearsay rule is his claim that no conspiracy was proven. While the respective parties did spend time proving or defending the existence of a conspiracy between respondent and Eggleston and while the hearing judge observed that such a conspiracy existed, it is not necessary for us to affirm that finding either to uphold the hearing judge's use of the hearsay exception or to find respondent culpable of the grievous misconduct charged in the Notice of Disciplinary

[10] Because the municipal court judge's nearly 100 page order for sanctions was admitted only for limited purposes, we have not considered the merits of its contents in reviewing this record. However, we consider the judge's order as evidence that that judge deemed that he had abundant cause for his sanctions order.

Charges. We agree with the State Bar that the law supporting use of the coconspirator exception to the hearsay rule does not require "absolute" proof of such a conspiracy, but only that there be independent evidence to establish prima facie the existence of a conspiracy and other preliminary facts. (See People v. Hardy (1992) 2 Cal.4th 86, 139.)[11] Those requirements were adequately met here based on the testimony of Fedorow and Kempka who were present at meetings at which respondent, Eggleston, and others discussed and planned their acts.

In addition, many of the statements to which Fedorow and Kempka testified were not hearsay because they could have been offered not to prove the truth of the matter stated, but for the purpose of showing that they were made in respondent's presence to disprove respondent's claim of lack of knowledge. (Evid. Code, §1200, subdivision (a).) Accordingly, in the absence of an objection and a request, made in accordance with Evidence Code section 355, that the use of those statements be admitted into evidence for the limited purpose of proving whether the statements were made in respondent's presence in accordance with Evidence Code section 355, any error in their admission was waived. (Evid. Code, §353, subd. (a).) Respondent does not contend that he made any such objection or request. In any case, we agree with the State Bar that the testimony of Kempka concerning respondent's use of the false declarations in the lawsuits in the Zwiebel matters was admissible under the adoptive admissions exception to the hearsay rule. (Evid.

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[11] The other preliminary facts required by Hardy and its cited authority are: (1) that the declarant was participating in the conspiracy when making the statement; (2) that the statement furthered the conspiracy's objective; and (3) that, at the time of the statement, the party against whom the evidence is offered was participating in or would later participate in the conspiracy. (People v. Hardy, supra, 2 Cal.4th at p. 139.)

Code, §1221; see Bowles v. State Bar (1989) 48 Cal.3d 100, 108 [failure of accused attorney to respond when charges would ordinarily call for a response warranted use of adoptive admission exception to hearsay rule].)

B. Discipline.

Respondent objects to the weighing by the hearing judge of the factors in mitigation and aggravation. Our review of the record shows that the hearing judge balanced appropriately all relevant factors, consistent with decisional law to that effect. (See, e.g., Sands v. State Bar (1989) 49 Cal.3d 919, 931.) The hearing judge correctly decided that the aggravating circumstances proved outweighed considerably the mitigating evidence. Not only were respondent's offenses most serious, involving deceit and harm to the victims and the administration of justice, they evidenced multiple acts of misconduct and covered many of the basic ethical violations which respondent's long practice at the bar should have served to avoid.

The hearing judge also determined correctly that the relevant standard calls for disbarment based on the severity of the offense and other appropriate factors. Most of the decisions deemed guiding by the hearing judge were in conviction referral matters. Had this matter arisen from conviction of a serious crime, there would be little doubt that disbarment would be the appropriate recommendation. (Compare In the Matter of Brazil (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679; see also In re Schwartz (1982) 31 Cal.3d 395.) Indeed, if respondent had been convicted of a crime involving moral turpitude subject to the provisions of section 6102, subdivision (c), he would have been subject to a recommendation of summary disbarment. However, although this is not a conviction referral matter, discipline must still be adequate to protect the public, courts and the

legal profession. (Std. 1.3; Snyder v. State Bar (1990) 40 Cal.3d 1302, 1307.)

Respondent asserts that our decision in In the Matter of Lilly (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, calls on us to weigh more heavily his lack of prior discipline. However, there are several key distinctions between Lilly and this case, most notably the far less serious misconduct found in Lilly. Similarly incomparable is another case relied on by respondent, In the Matter of Hultman (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297. In Hultman, the found misconduct was limited to an attorney's improper borrowing from two trusts in which he acted as trustee, aggravated by a false account to the probate court and reckless failure to provide services.

The State Bar has not cited any cases on the appropriate degree of discipline which we deem comparable, and we are unaware of any case decided by the Supreme Court similar to this case in its facts. However, we are aware that "[m]ultiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment. (Citations.)" (Lebbes v. State Bar, supra, 53 Cal.3d at p. 45; see also std. 2.3.)

This case presents serious acts of dishonesty which served to defraud two sellers of valuable real estate. Respondent's many ethical violations in the Zwiebel matter featured his harm to the Zwiebels and the honest administration of justice. Offenses concerning the administration of justice have been considered as very serious by the Supreme Court. (See Sands v. State Bar, supra, 49 Cal.3d at p. 930.)

A recent case decided by us, In the Matter of Priamos, supra, 3 Cal. State Bar Ct. Rptr. 824, offers some guidance. In that matter, the attorney had served as counsel to a client who had experienced emotional difficulties. The client asked Priamos to manage her investments and he agreed. He engaged in a practice of self-dealing with her investments, failed to keep adequate records and violated the ethical rules regarding entry into business transactions with a client. He showed indifference to rectifying the harm he caused and a lack of insight into his misconduct. Unlike the present case, Priamos had a prior imposition of discipline. We recommended disbarment, and the Supreme Court imposed that discipline.

It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. (See, e.g., Jones v. State Bar (1989) 40 Cal.3d 273; Chang v. State Bar (1989) 49 Cal.3d 114; Rosenthal v. State Bar (1987) 43 Cal.3d 612.) A most significant factor to the hearing judge, and to us as well, is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened and only seeks to blame others. Respondent's position would not be considered aggravating if it stemmed from an honest, but mistaken belief in his innocence (see Van Sloten v. State Bar (1989) 48 Cal.3d 921, 932); but the sizable record we have reviewed does not give respondent any plausible basis for such a belief. An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness has been considered an aggravating factor. (Carter v. State Bar (1988) 44 Cal.3d 1091, 1100-1101; Tarver v. State Bar (1984) 37 Cal.3d 122, 134.) This factor makes disbarment appropriate despite the fact that respondent presented some mitigating evidence. Even if we were to credit respondent's explanation that he surrendered too much control to Eggleston, it serves as a

grave risk to others who might be inclined to trust that such an experienced member of the bar would honestly discharge fiduciary duties. Respondent's repeated failure to discharge those duties on this record entitles the public to be protected by a formal reinstatement proceeding should he again seek to be licensed as an attorney.

C. Inactive Enrollment.

In his decision recommending respondent's disbarment, the hearing judge included an order involuntarily enrolling respondent as an inactive member of the State Bar in accordance with section 6007, subdivision (c)(4) as amended effective January 1, 1997, and rule 220(b) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings. However, we recently held in In the Matter of Phillips (Review Dept. 1999) 3 Cal. State Bar Ct. Rptr. _____, that section 6007, subdivision (c)(4) as amended effective January 1, 1997, may not be applied in cases in which the notice to show cause (or the notice of disciplinary charges) was filed before January 1, 1997. In the present consolidated proceeding, both of the notices to show cause were filed before January 1, 1997. Accordingly, we shall reverse the hearing judge's order enrolling respondent inactive.

III. Recommendation

For the foregoing reasons, we adopt the decision of the hearing judge and his recommendation that respondent Robert H. Wyshak be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts

specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with section 6086.10 and that such costs be payable in accordance with section 6140.7, as amended effective January 1, 1997.

IV. Order

We reverse the hearing judge's February 27, 1998, order involuntarily enrolling respondent Robert H. Wyshak as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (c)(4) and order respondent's inactive enrollment under section 6007, subdivision (c)(4) terminated forthwith. This order is without prejudice to respondent's inactive enrollment, if warranted, under former section 6007, subdivision (c)(4) after appropriate notice and hearing.

STOVITZ, J.

We concur:

OBRIEN, P.J.

NORIAN, J.